

# ATTACHMENT J

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

AMERICAN DIAL TONE, INC., )

Plaintiff, )

vs. )

Case No. 8:10-CV-2194-T-27MAP

BELLSOUTH TELECOMMUNICATIONS, )  
INC. D/B/A AT&T FLORIDA, )

Defendant. )

**RESPONSE IN OPPOSITION AND INCORPORATED MEMORANDUM OF LAW  
TO PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION**

Defendant, BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T"), pursuant to Fed. R. Civ. P. 65 and M.D. Fla. L.R. 4.06, hereby files its Response in Opposition and Incorporated Memorandum of Law to the Brief in Support of Preliminary Injunction<sup>1</sup> ("Brief") filed by Plaintiff, American Dial Tone, Inc. ("ADT")<sup>2</sup>. The Court should deny ADT's request for preliminary injunction because: (1) the Court lacks subject matter jurisdiction to hear this case; (2) ADT failed to exhaust its administrative remedies at the Florida Public Service Commission ("FPSC"), thus, it has not met all conditions precedent to bringing this action; and (3) ADT failed to satisfy any of the requirements of the four prong test for obtaining a preliminary injunction.

**I. Preliminary Statement and Factual Background**

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<sup>1</sup> ADT originally filed an Emergency Motion for Temporary Restraining Order; however, the Court via its October 1, 2010 Order converted the motion to a Motion for Preliminary Injunction. On October 13, 2010, ADT filed its Brief in Support of Preliminary Injunction.

<sup>2</sup> Because AT&T has not yet been properly served under the Federal Rules with a copy of the Summons and Complaint, AT&T is not filing contemporaneous with this pleading a responsive pleading to the Complaint.

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In order to put the facts of this case in their proper context, the Court should be aware of the relationship between three companies: ADT, LifeConnex Telecom, LLC f/k/a Swiftel, LLC ("LifeConnex") and Associated Telecommunications Management Services, LLC ("ATMS"). ADT and LifeConnex are affiliate companies operating as competitive local exchange companies ("CLECs") in Florida (and other states) that are owned by ATMS. While ADT attempts to portray itself and its affiliates as last-resort competitive alternatives for the economically disadvantaged, at least two public service commissions have raised concerns about ATMS's business practices as they relate to providing service to the economically disadvantaged.<sup>3</sup>

The genesis of the dispute at issue in this case follows a July 16, 2010 Order<sup>4</sup> of the FPSC requiring LifeConnex to post a \$1,400,000 bond in favor of AT&T and pay future bills "in full" and, if LifeConnex failed to do so, granting AT&T authority to cease doing business with LifeConnex. After LifeConnex failed to post the bond within the time required by the FPSC, AT&T disconnected LifeConnex's service. AT&T subsequently learned that LifeConnex and ADT embarked on a scheme wherein ADT stepped in as a "straw man" for its affiliate, and began purchasing residential service from AT&T and reselling it to LifeConnex. In other words, ADT began purchasing wholesale "residential" services not just for ADT customers, but also for its affiliate, LifeConnex, which is a "business" entity. This

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<sup>3</sup> The ATMS companies operating in Florida are currently under investigation by the staff of the FPSC in *In re: Investigation of Associated Telecommunications Management Services, LLC (ATMS) companies for compliance with Chapter 25-24, F.A.C., and applicable lifeline, eligible telecommunications carrier, and universal service requirements*. Docket No. 100340. See document obtained from FPSC staff attached hereto as Exhibit "A" describing the ATMS companies' various alleged misdeeds. See also, a pleading filed by the Office of Regulatory Staff in South Carolina outlining various misdeeds perpetrated by LifeConnex. See South Carolina Office of Regulatory Staff document attached hereto as Exhibit "B."

<sup>4</sup> Order No. PSC-10-0457-PCO-TP issued in Docket No. 100021-TP, a copy of which is attached as Exhibit "C."

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novel, and illegal, arrangement had, to AT&T's knowledge, never been attempted by these (or any other) companies and was clearly devised simply as a means to avoid the application of the FPSC Order. As a result, upon learning of ADT's actions, on September 13, 2010, AT&T sent a "Suspension and Disconnection Notice," identifying ADT's contract and tariff breaches in reselling AT&T's residential service to LifeConnex and the legal basis for AT&T's position. A copy of the letter is attached as Exhibit "D." Rather than cure its breaches in the time frame set forth in the letter or seek relief at the FPSC, ADT sent a letter admitting that it was reselling residential service to its business affiliate, LifeConnex, and disputing the legal basis of AT&T's position.

As discussed in greater detail below, this particular shell game that LifeConnex and ADT have chosen to play, clearly in an effort to avoid the effect of the FPSC Order, violates state law, federal law, and AT&T's General Subscriber Services Tariff ("Tariff") as incorporated into the parties' interconnection agreement ("ICA") and, therefore, AT&T has the legal and contractual right to refuse service to ADT. There is no legitimate basis for enjoining AT&T from its right to do so, and ADT's Motion for Preliminary Injunction should be denied.

**II. Telecommunications Act of 1996**

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(codified at 47 U.S.C. § 151 *et seq.*) ("the 96 Act") requires incumbent local exchange carriers ("ILECs"), such as AT&T, to enter into "interconnection agreements" or "ICAs" with CLECs, such as ADT and LifeConnex. These agreements establish the terms and conditions on which ILECs provide their competitors with, among other things,

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interconnection with the ILEC's network, so that traffic can flow between the carriers' networks (47 U.S.C. § 251(c)(2)), the use of individual elements of the incumbent's network on an "unbundled" basis, so that competitors can serve their customers without having to build their own networks from scratch (*id.* § 251(c)(3)), and – most pertinent here – telecommunications service at wholesale rates, for competitors to resell at retail (*id.* § 251(c)(4)). The ICAs are submitted to, and approved by, public service commissions on a state-by-state basis by the relevant state commission.<sup>5</sup> *Id.* § 252(e).

State commissions have the power to interpret and enforce ICAs in the first instance and, only after the state commission has rendered its decision, does jurisdiction shift to the federal courts<sup>6</sup> to review the state commission decision. *See BellSouth Telecomms., Inc. v. MCIMetro Access Trans. Serv., Inc.*, 317 F.3d 1270, 1277-1278 (11<sup>th</sup> Cir. 2003) ("Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts," and "it is consistent with the FCTA to have state commissions interpret contracts and subject their interpretations to federal review in the district courts.").

### III. Applicable Legal Standard

A district court may grant a preliminary injunction only if the moving party shows that (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be

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<sup>5</sup> Rather than negotiate a new ICA, a CLEC may adopt in its entirety any existing ICA to which the ILEC is a party that has already been approved by the relevant state commission. 47 U.S.C. § 252(i). Pursuant to this provision, in July 2006, ADT adopted the ICA (and all amendments) between AT&T and Amerimex Communications Corp. *See In re: Notice of Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. and Amerimex Communications Corp. by Ganoco, Inc. d/b/a American Dial Tone*, FPSC Docket No. 060522. This ICA is over 900 pages.

<sup>6</sup> State courts have no jurisdiction to review the actions of a state commission in approving or rejecting an interconnection agreement. 47 U.S.C. § 252(e)(4).

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suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11<sup>th</sup> Cir. 2004); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11<sup>th</sup> Cir. 2001). A preliminary injunction is “an extraordinary and drastic remedy” and “is not to be granted unless the movant ‘clearly established the burden of persuasion’ as to the four prerequisites.” *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11<sup>th</sup> Cir. 1983) (quoting *Canal Auth. of State of Florida, Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5<sup>th</sup> Cir. 1974)).

Finally, although ADT’s filings are completely silent on this requirement, Fed. R. Civ. P. 65(c) requires that no injunctive relief can be issued without the giving of security by the movant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. *Piambino v. Bailey*, 757 F.2d 1112, 1143 (11<sup>th</sup> Cir. 1985) (“[B]efore a court may issue a preliminary injunction, a bond must be posted”).

**IV. The Court Lacks Jurisdiction Over ADT’s Request for Preliminary Injunction**

**A. The 96 Act Grants the FPSC Exclusive Jurisdiction Over ADT’s Claim**

ADT has alleged two counts in its Complaint – Count I – Breach of Contract and Count II – Anticipatory Breach of Contract. At its core, these claims involve the interpretation and enforcement of its ICA with AT&T – is ADT improperly reselling AT&T residential service to its affiliate, LifeConnex a business entity, and does AT&T have the contractual right under the ICA to disconnect ADT’s service without first seeking permission

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from the FPSC? As explained below, these issues fall within the exclusive jurisdiction of the FPSC in the first instance.

Section 252 of the 96 Act establishes the procedural framework for, *inter alia*, the interpretation and enforcement of ICAs. It requires that ICAs “adopted by negotiation or arbitration” be “submitted for approval to the State commission,” 47 U.S.C. § 252(e)(1), and provides for district court review only after a commission, acting as a “deputized regulator”, has ruled on an ICA. *Id.* § 252(e)(6)). *MCI Telcoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7<sup>th</sup> Cir. 2000). As noted, it is only after the state commission first interprets and enforces ICAs that jurisdiction transfers to the federal courts to review the state commission’s decision. *See MCIMetro Access Trans. Serv., Inc.*, 317 F.3d at 1277-78.<sup>7</sup>

Courts thus routinely dismiss ICA disputes that, like ADT’s claims here, were not challenges to state commission decisions, but were brought in federal court in the first instance. *See, e.g., Supra Tel. & Inform. Sys., Inc. v. BellSouth Telecomms., Inc.*, 2001 U.S. Dist. Lexis 23816, \*2 (S.D. Fla. June 8, 2001) (dismissing breach of contract claim because the court found that it “must first be presented to the [FPSC]” and court did not have subject matter jurisdiction) and *Express Tel. Servs., Inc. v. Southwestern Bell Tel. Co.*, 2002 U.S. Dist. Lexis 19645, at \*5 (N.D. Tex. Oct. 16, 2002) (dismissing, for lack of ripeness and jurisdiction, complaint by reseller of AT&T services on the ground that reseller had failed to bring its claim for breach of ICA to state commission). Likewise, federal courts routinely

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<sup>7</sup> *See also Atlantic Alliance Telecomms., Inc. v. Bell Atl., Inc.*, 2000 U.S. Dist. Lexis 19649, at \*8 (E.D.N.Y. Apr. 19, 2000) (“[C]ourts have held that disputes over the interpretation of terms in agreements that have already been approved must first be presented to state commissions before a federal court has jurisdiction.”).

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dismiss ICA disputes that allege diversity jurisdiction<sup>8</sup>, such as ADT has pled in this matter, because as noted in footnote no. 6 above, state courts lack jurisdiction over ICA disputes. *See, e.g., Contact Comm. v. Qwest Corp.*, 246 F. Supp. 2d 1184, 1191 (D. Wyo. 2003)(dismissing breach of ICA claim (alleging diversity jurisdiction) for lack of subject matter jurisdiction where the court found that “the assertion that this Court has initial jurisdiction pursuant to its diversity jurisdiction over such disputes is at odds with the cooperative federalism scheme created by Congress. In order to be ripe for review for this court, the plaintiff must be “aggrieved” by the state commission’s determination... Circumventing the commission would jeopardize the entire system of review established by the Act.”) and *Alliance Comm. Coop., Inc. v. WWC License, L.L.C.*, 2007 U.S. Dist. Lexis 24566 \*5 (D. S.D. March 29, 2007)(dismissing breach of ICA claim for lack of subject matter jurisdiction where the court found that “the statutory scheme set forth in the Telecommunications Act makes the state utility regulatory commissions the initial decision-makers in disputes involving interconnection agreements.”). If the Court would allow ADT’s Complaint to be heard here rather than at the FPSC, it would “deprive the [FPSC] of authority to interpret the agreement that it has approved” and would “subvert the role that Congress prescribed for state commissions.” *MCIMetro Access Trans. Serv., Inc.*, 317 F.3d at 1278 n.9.

**B. The ICA Requires ADT to First Seek Relief at the FPSC**

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<sup>8</sup> A federal court sitting in diversity is an adjunct of the state courts and, as such, an action that cannot be maintained in state court cannot be maintained by a federal court. *See Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108-09 (1945)(holding that because a federal court exercising diversity jurisdiction is “in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State.”)



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Consistent with the grant of exclusive jurisdiction to the state commissions in the 96 Act, the ICA between ADT and AT&T requires ADT to first seek relief at the FPSC before coming to this Court. Section 8 of the General Terms & Conditions (“GTC”) of the ICA provides:

Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, shall petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

“It is a venerable principle of contract law that the provisions of a contract should be construed so as to give every provision meaning.” *Florida Polk County v. Prison Health Servs.*, 170 F.3d 1081, 1084 (11<sup>th</sup> Cir. 1999). A forum selection clause may be “mandatory” or “permissive.” A mandatory clause contains specific language “such that it dictates an exclusive forum for litigation under the contract.” *Snapper v. Redan*, 171 F.3d 1249, 1262 n.24 (11<sup>th</sup> Cir. 1999). Here, there can be no question that the parties’ forum selection clause is mandatory -- “[i]f any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, *shall petition the [Florida] Commission for a resolution of the dispute.*”

ADT turns this requirement on its head and alleges that AT&T should have affirmatively gone to the FPSC to report on ADT’s violations and that, in failing to do so, AT&T somehow anticipatorily breached the ICA. *See, e.g.*, Complaint, ¶¶ 13, 16. However, here, ADT is “the aggrieved Party” seeking to prevent AT&T from enforcing the clear and ambiguous provisions of the ICA. It is ADT that must then “petition the Commission for a

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resolution of the dispute.” ADT has failed to comply with this provision by filing the instant action in this Court rather than at the FPSC.<sup>9</sup>

**C. To the Extent the Court arguably has Jurisdiction, the Doctrine of Primary Jurisdiction Applies**

The 96 Act creates a comprehensive regulatory structure for interpretation and resolution of ICA disputes. Accordingly, even if the court arguably has jurisdiction over ADT’s complaint, it should defer to the primary jurisdiction of the FPSC on the issues as to whether ADT is improperly cross-class selling and whether AT&T breached the parties’ ICA. As explained in *United States v. Western Pacific Ry.*, 352 U.S. 59, 63-64 (1956):

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.... ‘Primary jurisdiction’...applies where the claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.<sup>10</sup>

Where the relief being sought is prospective, as it is here, the doctrine applies with special force because the agency, here the FPSC, has the opportunity to develop the record and bring its special expertise to bear. Since the core issue in this case is the interpretation of

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<sup>9</sup> AT&T notes that earlier this year, ADT’s affiliate, LifeConnex, filed its Request for Emergency Relief, in an attempt to prevent suspension and disconnection by AT&T, at the FPSC rather than in state or federal court. LifeConnex has the same “Resolution of Disputes” provision in its ICA with AT&T. LifeConnex ICA, GTC § 8 (“Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, shall petition the Commission for a resolution of the dispute.”). Attached hereto as Exhibit “E.” Perhaps because LifeConnex lost that motion, ADT thought that it would have a better audience with this Court than in the FPSC. This is nothing more than blatant forum-shopping that the Court should not endorse.

<sup>10</sup> See also *Smith v. GTE South, Inc.*, 236 F.3d 1292, 1298, n. 3 (11<sup>th</sup> Cir. 2001) (“Primary jurisdiction is a judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the actions by an administrative agency.”).

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an ICA, the FPSC, which is specifically charged with resolution of such a dispute, should be given an opportunity to resolve these matters. This action should therefore be dismissed or stayed under the doctrine of primary jurisdiction.

**V. Argument**

To the extent the Court finds that it does have jurisdiction over ADT's Request for Preliminary Injunction, that request should be denied on its merits. A plaintiff seeking a preliminary injunction bears a heavy burden of persuasion. This requires coming forward with independent proof on each of the four elements that must be shown to obtain the injunction. *Jefferson County*, 720 F.2d at 1519. Here, ADT has not and cannot carry its burden on any of the four elements.

**A. ADT Cannot Establish a Substantial Likelihood of Success**

**1. The FCC and the FPSC Authorize Restrictions on Cross-Class Selling.**

In telecommunications services, residential service constitutes one "class" of service, and business service constitutes another "class" of service.<sup>11</sup> By reselling AT&T's residential service to LifeConnex, a business entity, ADT is improperly engaging in what is known as "cross-class" selling. ADT admits that it is reselling AT&T's residential telephone service to LifeConnex, an affiliated business entity, and that then LifeConnex resells this service to LifeConnex's end-user customers. *See* Brief at 2 ("For a short time (a matter of months), ADT is also purchasing residential lines from AT&T which are used by LifeConnex, an affiliate of ADT, to provide retail service to its own remaining residential customers in Florida."). This is a pure example of improper cross-class selling that is

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<sup>11</sup> "Class of Service" is defined as "[a] description of telephone service furnished a subscriber in terms such as: (3) Character of Use: Business or residence." Tariff, § A1. Definition of Terms. .

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prohibited under federal law, state law, the ADT ICA, and AT&T's Tariff.

Both the Federal Communications Commission ("FCC") and the FPSC have authorized restrictions on such improper cross-class selling. In its *Local Competition Order*, the FCC held that Section 251(c)(4) of the 96 Act authorizes state commissions the authority to prevent resellers from reselling wholesale-priced residential services to business customers. See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rc'd 15499, First Report and Order (August 8, 1996) at Paragraph 962 ("We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from reselling wholesale-priced residential services to business customers."). This authorization is further codified in the FCC's regulations implementing the 96 Act. Through 47 C.F.R. §1.613(a)(1), the FCC specifically granted "state commission[s]" the authority to "permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC."

Consistent with this FCC authorization, the FPSC has ordered that a cross-class selling prohibition is valid. In *In re: Petitions by AT&T Communications of the Southern States, Inc. et al. for arbitration of certain terms and conditions of a proposed agreement*

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*with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996*, Docket Nos. 960833-TP, 960846-TP, 960916-TP, Order No. PSC-96-1579-FOF-TP (Issued December 31, 1996) at 60, the FPSC ruled:

Upon consideration, we believe that certain cross-class selling restrictions are appropriate. In particular, we find appropriate restrictions that would limit resale of...residential services... to end users who are eligible to purchase such service directly from BellSouth. Thus, based on the evidence and arguments presented, we find that no restrictions on the resale of services shall be allowed, except for restrictions applicable to the resale of...residential services... to end users who are eligible to purchase such service directly from BellSouth.

Consistent with this order, the FPSC-approved ICA between AT&T and ADT provides that AT&T will make telecommunications services available to ADT for resale “[s]ubject to effective and applicable FCC and Commission rules and orders . . . .” ICA, Attachment 1 (Resale), § 3.1, and it specifically states that the “resale of telecommunications services shall be *limited to users and uses conforming to the class of service restrictions.*” *Id.* § 4.1.1 (emphasis added).<sup>12</sup> ADT, therefore, cannot “purchase at wholesale rates for resale, telecommunications services that [AT&T] makes available only to residential customers” and then “offer[] such services to classes of customers that are not eligible to subscribe to such services from [AT&T].” 47 C.F.R. § 51.613(a)(1). Because a business entity like LifeConnex is not eligible to subscribe to residential services from AT&T, ADT cannot purchase residential services from AT&T at wholesale rates for resale and then offer those services to LifeConnex.

Additionally, the ICA provides that “[r]esold services can only be used in the same manner as specified in [AT&T]’s Tariffs” and that resold services “are subject to the same

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<sup>12</sup> The referenced ICA provisions in this Response are attached hereto as Exhibit “F”.

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terms and conditions as are specified for such services when furnished to an individual End User of [AT&T] in the appropriate section of [AT&T]'s Tariffs." ICA, Attachment 1 (Resale), § 4.2. AT&T's Tariff,<sup>13</sup> in turn, provides that "[t]elephone equipment, facilities, and service are furnished to the subscriber for use by the subscriber" and "[t]he subscriber's service may be shared with, but not resold to, the following individuals as authorized by the subscriber for that specific service..." Tariff § A2.2.1A.<sup>14</sup> Moreover, "[i]n general, basic local exchange service as set forth in Section A2 of this Tariff is furnished for the exclusive use of the subscriber, employees, agents, representatives, or members of the subscriber's domestic establishment," and "[r]esale of local exchange service is permitted only under specific conditions as described in this Tariff." *Id.* § A23.1.1.A. Those "specific conditions" provide that "[r]esale is permitted where facilities permit and within the confines of specifically identified continuous property areas under the control of a single owner or management unit," *id.* § A23.1.2.B, a condition which clearly is not met when ADT purchases residential services from AT&T for resale and then provides those services to a business entity like LifeConnex. In its Brief, ADT fails to even mention, much less distinguish, why these Tariff provisions do not apply.

Despite its acknowledgement that it "may not purchase residential lines from AT&T and resell those lines to end users who are not residential customers," Request at 8, ADT contends that the ICA "expressly permits ADT to 'purchase resale services from [AT&T] for

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<sup>13</sup> A tariff filed with a regulatory agency has the force and effect of law as to services arising under it. *See MCI Telecomm. Corp. v. Best Tel. Co.*, 898 F. Supp. 868, 872 (S.D. Fla. 1994).

<sup>14</sup> Tariff § A2.2.1B provides that services specified in the Tariff may be resold; however, "except as otherwise noted by the Florida Public Service Commission," ICAs and the Tariff. As indicated, all three prohibit ADT from cross-class selling to its affiliate, LifeConnex. The referenced Tariff provisions in this Response are attached hereto as Exhibit "G".

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its own use in operating its business” and that the “business” of ADT includes the provision of wholesale, residential service to its affiliate, LifeConnex. Brief at 9. However, the “for its own use in operating its business” provision (ICA, Resale (Attachment 1) § 3.2) only allows ADT to order telephone lines for “its business” not to order lines for another company’s business.<sup>15</sup> See William E. Greenlaw Declaration, ¶ 4 attached hereto as Exhibit “H”.

Finally, the ICA provides that if ADT uses a resold telecommunications service “in a manner other than that for which the service was originally intended as described in [AT&T]’s retail tariffs, [ADT] has the responsibility to notify [AT&T].” ICA, Attachment 1 (Resale), § 3.13. It further provides that if ADT “desires to transfer any services hereunder to another provider of Telecommunications Service, or if [ADT] desires to assume hereunder any services provisioned by [AT&T] to another provider of Telecommunications Service, such transfer of services shall be subject to separately negotiated rates, terms and conditions.” ICA, GTC, § 18.2. ADT failed to notify AT&T that it was providing residential services it purchased from AT&T for resale to a business entity, and ADT and AT&T have not “negotiated rates, terms and conditions” under which ADT may transfer residential services AT&T provides to ADT for resale to another provider.

Accordingly, based upon the foregoing, the actions of ADT and LifeConnex violate state law, federal law, and AT&T’s Tariff as incorporated into the parties’ ICAs and AT&T therefore has the right to refuse service to ADT.

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<sup>15</sup> AT&T believes that LifeConnex’s actions in ordering services and obtaining services via ADT’s ICA with AT&T, while LifeConnex has an existing ICA with AT&T, is also an improper attempt to substitute the terms of LifeConnex’s current ICA with the terms of ADT’s ICA with AT&T. This appears to violate the spirit of the FCC’s “all-or-nothing” rule. See Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494 at ¶ 10 (Rel. July 13, 2004) (“A requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms and conditions of the adopted agreement.”).

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2. AT&T has the Right to Refuse Service to ADT Based on its Unlawful Use of AT&T's Residential Services.

Inasmuch as ADT is violating state law, federal law, and AT&T's Tariff as incorporated into the ADT ICA, numerous provisions of the FPSC-approved ICA between AT&T and ADT grant AT&T the right to refuse service to ADT:

[AT&T] can refuse service when it has grounds to believe that service will be used in violation of the law. ICA, Attachment 1 (Resale) § 3.11.

Service is furnished subject to the condition that it will not be used for any unlawful purpose. *Id.* § 3.9.

In addition to as otherwise set forth in this Agreement, [AT&T] reserves the right to suspend access to ordering systems, refuse to process additional or pending applications for service, or terminate service in the event of prohibited, unlawful or improper use of [AT&T]'s facilities or service, abuse of BellSouth's facilities or any other material breach of this Agreement, and all monies owed on all outstanding invoices shall become due. *Id.*, GTC, § 2.4.

[AT&T] reserves the right to Suspend, Discontinue or Terminate service in the event of prohibited, unlawful or improper use of [AT&T]'s facilities, abuse of [AT&T]'s facilities, or any other violation or noncompliance by [ADT] of the rules and regulations of [AT&T]'s tariffs. *Id.*, Attachment 7 (Billing) § 1.5.2.

These provisions unambiguously grant AT&T the right to suspend and disconnect ADT's services without first seeking permission from the FPSC to "refuse service" to ADT, as ADT improperly suggests.<sup>16</sup> When, as here, the ICA is "an unambiguous agreement," it "must be enforced in accordance with its terms." *Paddock v. Bay Concrete Indus., Inc.*, 154 So.2d 313 (Fla. 2d DCA 1963); *see also Brooks v. Green*, 993 So. 2d 58 (Fla. 1<sup>st</sup> DCA 2008) ("It is established law in this state that a contract must be applied as written, absent an

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<sup>16</sup> ADT's claims that AT&T should have followed the billing dispute provisions contained in ICA when it became aware of ADT's improper cross-class selling to LifeConnex. This argument fails because those provisions do not apply. This is not a billing dispute; this dispute concerns ADT's admitted cross-class selling of residential service to an affiliate for which AT&T has the contractual right to suspend and disconnect service.



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ambiguity or some illegality.”). To the extent ADT disputes AT&T’s decision, ADT must seek relief as the “aggrieved party” under the dispute resolution provisions of the ICA at the FPSC. *See* ICA, GTC § 8.

**B. ADT Will Not Suffer Irreparable Injury**

ADT requests that the Court issue a preliminary injunction “in order to prevent irreparable harm to ADT and its customers.” Brief at 2. In its Complaint, however, ADT asserts that AT&T’s “breach will result in substantial damages to ADT,” Complaint, ¶ 16, and requests that a judgment be entered against AT&T “awarding damages in an amount to be fixed at trial, together with interest.” *Id.* ¶¶ 14, 17. Moreover, in its response to AT&T’s breach letter, ADT stated that if AT&T intended to proceed with termination, ADT would seek “monetary damages in a court of competent jurisdiction.” Exhibit “I” at 3.

It is only those injuries that cannot be redressed by application of a judicial remedy after a hearing on the merits that justify preliminary injunctive relief. *Canal Auth. of State of Fla.* 489 F.2d at 572. Moreover, an injury is irreparable only if it cannot be redressed through monetary remedies. *Cunningham v. Adams*, 808 F.2d 815, 821 (11<sup>th</sup> Cir. 1987). An irreparable injury is the “sine qua non” of injunctive relief. *Northeastern Fla. Chapter of the Ass’n of General Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11<sup>th</sup> Cir. 1996). Plaintiff must establish that it will suffer or face a substantial likelihood of irreparable harm, which must be neither remote nor speculative but actual and imminent. *Doran v. Salem*, 422 U.S. 922, 931 (1975); *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 486 (11<sup>th</sup> Cir. 1990). The absence of a substantial likelihood of

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irreparable injury, standing alone, makes preliminary injunctive relief improper, even where the Plaintiff shows a substantial likelihood of success on the merits. *Snook*, 909 F.2d at 486.

As an injunction is not proper when an injury can be redressed by a judicial remedy (i.e. damages), and as ADT has requested monetary damages in its Complaint, by definition, it does not have an injury that is irreparable. *See Cunningham v. Adams*, 808 F.2d 815, 821 (11<sup>th</sup> Cir. 1987) (noting that an injury that money damages can remedy is by definition not irreparable). It is clear here that monetary damages will be sufficient because that is what ADT agreed to in the ICA. Specifically, Section 5.3 of the GTC of the ICA provides that:

each Party's liability for any loss, cost, claim, injury, liability or expense, including reasonable attorneys' fees relating to or arising out of any cause whatsoever, whether based in contract, negligence or other tort, strict liability or otherwise, relating to the performance of this Agreement, shall not exceed a credit for the actual cost of the services or functions not performed or improperly performed.

There is nothing unclear about this provision and the agreed measure of damages is easily determined.

ADT cites to *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11<sup>th</sup> Cir. 2005), for the proposition that "the loss of customers and goodwill is irreparable injury"; however, ADT has failed to demonstrate that disconnection of its service by AT&T would actually result in a loss of service to ADT's customers as it appears from ADT's website that ADT's customers are actually receiving service from an unrelated carrier, Easy Telephone Services, Inc. *See* <http://www.americandialtone.com/ADTApps/LifelineCert.aspx?stateName=FL>. Greenlaw

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Declaration ¶ 5.<sup>17</sup> Specifically, ADT's website advises ADT's customers that their service is being provided by "Easy Telephone" and requires their acknowledgement as follows: "I authorize Easy Telephone Services, Inc. to be my local and long distance carrier for the above listed number. I also understand that I will be billed for my telephone service by Easy Telephone Services, Inc." *Id.*

Accordingly, based upon the foregoing, ADT will not suffer any "loss of customers and goodwill" if it is suspended or disconnected by AT&T as it appears from ADT's website that ADT is currently providing services to its customers via another provider. This counters ADT's contention that it will suffer "irreparable harm" if it is suspended or disconnected by AT&T as it is currently (and will presumably continue) providing service to customers via another provider, Easy Telephone Service, Inc., as indicated on ADT's website.<sup>18</sup> Accordingly, injunctive relief is not warranted as ADT's alleged injury (loss of customers and goodwill) is not "actual and imminent" thus it is not an "irreparable injury".

**C. ADT Cannot Establish that any Threatened Injury to ADT Would Outweigh the Harm to AT&T**

ADT claims that it faces "certain and significant harm" unless it obtains injunctive relief and that AT&T would suffer "no irreparable harm." Brief at 13. However, AT&T would suffer irreparable harm as ADT's actions, as indicated above, violate federal law, state law, and AT&T's Tariff as incorporated into the ICA.

**D. ADT Cannot Establish that an Injunction Would Serve The Public Interest**

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<sup>17</sup> A copy of the documents from ADT's webpage are attached to the Greenlaw Decl. as Exhibits "1" and "2".

<sup>18</sup> AT&T believes that Easy Telephone Services, Inc. may also be in violation of federal law, state law, AT&T's Tariff as incorporated into the parties' ICA. However, since ADT is able to continue to provide services to its customers even after suspension or disconnection, ADT's alleged injury (loss of customers and goodwill) is not "actual and imminent" thus it is not "irreparable." *Doran*, 422 U.S. at 931; *Snook*, 909 F.2d at 486.

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An injunction would usurp administrative authority and violates the spirit and letter of the parties' ICA. The 96 Act and its implementing federal and state regulations and orders create a comprehensive framework for determining questions relating to ICAs between ILECs and CLECs. This framework of "cooperative federalism" leaves to each state's utility commission the authority to make decisions as to ICA disputes for its own jurisdiction. To this end, the ICA governing the relations between ADT and AT&T includes a dispute resolution clause (ICA, GTC § 8) which requires ADT's present dispute regarding the ICA be brought at the FPSC. ADT has failed to comply with this provision by filing its Complaint in federal court rather than at the FPSC.

Moreover, the public interest would not be served by the entry of a preliminary injunction on a two-party dispute such as the one here, nor is such a drastic remedy appropriate where ADT should have brought its breach of ICA claims at the FPSC. When, as here, ADT cannot prove that a single customer will actually lose service and does nothing to demonstrate that its customers are without other options (*See Greenlaw Decl. ¶ 6*), it has utterly failed to show that an extraordinary and drastic remedy is warranted.<sup>19</sup>

**E. Security**

If, despite the foregoing analysis, the Court grants ADT's request for a preliminary injunction, ADT must be required to post adequate security. If AT&T is forced to continue providing services to ADT despite its clear contract and tariff breaches, ADT should be

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<sup>19</sup> The ATMS companies have proven quite resourceful in continuing to provide service to their customers despite being disconnected by AT&T, as evidenced by the fact that LifeConnex, despite being disconnected by AT&T in August 2010, continues to provide service to customers.

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required to post security sufficient to protect AT&T. This is of particular concern, given that ADT's affiliate, LifeConnex, failed to post a \$1,400,000 bond as ordered by the FPSC.

**VI. Conclusion**

For the reasons set forth above, AT&T respectfully requests that this Court deny ADT's request for a preliminary injunction.

Respectfully submitted,

s/ E. Earl Edenfield, Jr.

**E. Earl Edenfield, Jr.**

Florida Bar. No. 793426

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ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that on October 19, 2010, I filed the foregoing Response in Opposition to Brief in Support of Preliminary Injunction with the Clerk of the Court. I also certify that a true and correct copy of the foregoing document is being served this day to each of the following by the manner specified.

Joseph R. Hutchinson  
HUTCHINSON FIRM, P.A.  
2905 4<sup>th</sup> Street N.  
St. Petersburg, Florida 33704  
[Joe@Hutchfirm.com](mailto:Joe@Hutchfirm.com)  
Service Via CM/ECF

Marc James Ayers  
BRADLEY ARANT et al  
One Federal Place  
1819 Fifth Avenue North  
Birmingham, Alabama 35203  
[mayers@babco.com](mailto:mayers@babco.com)  
Service Via E-Mail

Respectfully submitted,

s/ Manuel A. Gurdian

## **Exhibit A**

**STATE OF FLORIDA  
FLORIDA PUBLIC SERVICE COMMISSION**


**AFFIDAVIT AND CERTIFIED COPY OF A COMMISSION RECORD**

**BEFORE ME**, the undersigned Notary Public of the State of Florida, on this 15th day of October, 2010, personally appeared Ann Cole, known to me to be a credible person and of lawful age, who being by me first duly sworn, on her oath, deposes and says:

1. I am the Commission Clerk of the Office of Commission Clerk for the Florida Public Service Commission, State of Florida.

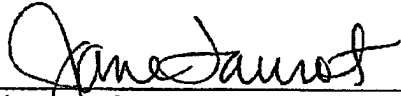
2. In my capacity as Commission Clerk, I hereby certify the attached Information Background for September 7, 2010 Meeting with ATMS (4 pages) is a true and correct copy of such record found in the official records of the Florida Public Service Commission.

**ATTESTED THIS** 15th day of October, 2010, in Leon County, State of Florida.

  
\_\_\_\_\_  
Ann Cole, Commission Clerk  
Office of Commission Clerk

**State of Florida  
County of Leon**


Sworn to (or affirmed) and subscribed before me  
this 15th day of October, 2010.

  
\_\_\_\_\_  
(Signature of Notary Public - State of Florida)  
Personally Known XX



## **Information Background for September 7, 2010 Meeting with ATMS**

### **I) Failure to Provide Accurate Information to Regulators**

- i) *Paul Watson, Chief Operating Officer of ATMS, provided Direct Testimony on February 8, 2010, to the South Carolina PSC stating that LifeConnex had not been audited by USAC or any other entity pertaining to Lifeline and Link-Up (See South Carolina Docket 2009-414-C). (In a subsequent June 23, 2010 meeting with the South Carolina PSC, ATMS admitted that a USAC audit of LifeConnex had been going on for approximately three years.)*
- ii) *In a August 20, 2010 letter to the PSC Director of the Regulatory Analysis Division, ATMS responded to Thomas Biddix's statements that "LifeConnex passed the USAC audit with flying colors." The ATMS letter states that "at no time before or after the purchase of LifeConnex on September 1, 2009, was Mr. Biddix led to believe by USAC staff that there were any issues or problems regarding the audit." (The USAC audit results were e-mailed to Thomas Biddix on February 12, 2010. E-mail correspondence provided to the PSC by ATMS show Thomas Biddix forwarded the audit results to Paul Watson, ceo@telecomgroup.com, Angie Watson, and Steve Watson on February 13, 2010.)*
- iii) 
- iv) *ATMS companies may not be providing correct revenue information on their PSC regulatory assessment fee (RAF) returns or paying the correct amount of RAFs (possible violation of Section 364.336, Florida Statutes, and Rule 25-4.0161, Florida Administrative Code). The Florida Gross Operating Revenue on LifeConnex's 2009 RAF Return showed a huge decrease from 2008. After staff questioned the large revenue change, LifeConnex filed an amended RAF return adjusting the gross revenue for 2009 and paying more RAFs.*
- v) *The July 29, 2010 ATMS Motion to Quash states that "BLC does not have any Florida Lifeline customers." BLC Management responses to staff data requests on March 22, 2010 and May 7, 2010 show BLC appears to have Lifeline customers in the State of Florida. A September 3, 2010 check of BLC Management's Web site also shows a Florida Lifeline application.*
- vi) *ATMS refused staff's request to provide a copy of a Universal Service Administrative Company audit completed on LifeConnex Telecom, a*



## **Information Background for September 7, 2010 Meeting with ATMS**


*ATMS company in Alabama which also provides service in Florida  
(possible violation of Section 364.183(1), Florida Statutes).*

### **II) Questionable Activities**

- i) The Florida Real Estate Commission found Thomas Biddix guilty of violating Section's 475.25(1)(a), 475.25(1)(b), 475.25(1)(e), 475.25(1)(k), 475.42(1)(b), and 475.42(1)(d), Florida Statutes, for depositing an escrow check in his personal checking account (FDPR case No. 9281261). Subsequent to that finding, Mr. Biddix was found guilty of failure to timely follow the provisions of a lawful order of the Florida Real Estate Commission in violation of § 475.25(1)(e), Florida Statutes, for not enrolling in a licensure course as ordered. Mr. Biddix's Florida Real Estate license was suspended twice and is now null and void.*
- ii) BLC Management d/b/a Angles Communications (BLC), had its CLEC certificate cancelled for failure to pay regulatory assessment fees (see PSC-08-0617-TX). BLC is presently doing business in Florida without a competitive local exchange certificate (possible violation of Rule 25-24.805, Florida Administrative Code.) BLC did not file and/or maintain a company price list at the PSC (possible violation of Rule 25-24.825, Florida Administrative Code.)*
- iii) The PSC Bureau of Consumer Assistance has received multiple consumer complaints regarding improper disconnects, slamming, and improper bills by ATMS companies in possible violations of Rule 25-4.118, Florida Administrative Code, 47 C.F.R. §64.1120, Rule 25-4.083(2), Florida Administrative Code, and Section 364.107, Florida Statutes.*
- iv) Complaints forwarded to ATMS companies by the PSC Bureau of Consumer Assistance are not being responded to within a 15-day period (possible violation of Rule 25-22-032, Florida Administrative Code).*
- v) Staff has concerns over the findings of the Universal Service Administrative Company Universal Service Low-Income audit of an ATMS company, LifeConnex Telecom in Alabama. After ATMS refused to provide a copy of the findings to staff, a copy of the audit findings was obtained from the Federal Communications Commission (see Docket No. 100000-OT, Confidential Document No. 07330-10).*
- vi) Staff has concerns over an ATMS vendor, Database Engineers, Inc., whose officers include Christopher Watson and Brian Cox. The FBI began investigating Database Engineers in 2009, and the U.S. Department of Justice in Tampa filed a lawsuit against Database Engineers, Inc. in May 2010, charging criminal copyright infringement regarding six websites.*

## **Information Background for September 7, 2010 Meeting with ATMS**

### **III Allegations Received by the PSC**

- i) *ATMS is "Cycloning" customers between sister companies for the purpose of claiming duplicate Link-up subsidies and duplicate non-recurring toll limitation service (TLS) subsidies after 30-45 days of service resulting in overpayment of Universal Service Funds (possible violations of Rule 25-4.118, Florida Administrative Code, 47 C.F.R. §64.1120, Rule 25-4.083(2), Florida Administrative Code, and Section 364.107, Florida Statutes.)*
- ii) *ATMS companies pass customer information (including self certification forms) to wholly-controlled marketing companies for the purpose of "Cycloning" customers to another wholly-controlled phone company (possible violation of Section 364.107, Florida Statutes.)*
- iii) *USA Freephone, an ATMS marketing company, receives calls from end users and places the Lifeline applicant with any ATMS company USA Freephone chooses (possible violations of Rule 25-4.118, Florida Administrative Code, and Section 364.107, Florida Statutes).*
- iv) 
- v) *ATMS does not provide written notices of disconnection to customers (possible violation of Rule 25-24.825, Florida Administrative Code).*
- vi) *ATMS is violating CPNI requirements by sharing wholesale customer information with sister ATMS companies (possible violations of Section 364.107, Florida Statutes and 47 C.F.R. § 64.2005).*
- vii) *ATMS companies are receiving Link-Up reimbursement from USAC but do not charge new applicants a hook-up fee resulting in overpayment of Universal Service Funds (possible violation of 47 C.F.R. §54.413(b).)*
- viii) *Lifeline subscriber numbers submitted to USAC by ATMS companies for reimbursement on Form 497 may not match actual number of subscribers resulting in overpayment of Universal Service Funds (possible violation of 47 C.F.R. §54.407.)*
- ix) *Resold Lifeline lines purchased from and claimed at USAC by the underlying carrier are possibly being claimed by ATMS companies resulting in overpayment of Universal Service Funds (possible violation of 47 C.F.R. §54.201.)*
- x) *ATMS companies provide Lifeline Service to consumers and collect USF funds for customers before Lifeline applicants sign a Lifeline certification*

## **Information Background for September 7, 2010 Meeting with ATMS**

*form certifying that they participate in a qualifying program and are eligible to receive Lifeline resulting in overpayment of Universal Service Funds (possible violation of 47 C.F.R. §54.401(a)(1)).*

- xi) Some ATMS companies designated as ETCs provide the required nine services using 100% resale service (possible violation of 47 C.F.R. §54.201(d)(1)).*
- xii) All ATMS associated companies have not been disclosed (possible violation of Section 364.183(1), Florida Statutes).*
- xiii) All owners and officers of ATMS have not been disclosed (possible violation of Section 364.183(1), Florida Statutes.)*
- xiv) ATMS companies are operating as a single entity which appears to be a contradiction to an ATMS data request response stating that each of the ATMS companies are independent and stand on their own.*

## **Exhibit B**

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84

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- iii. Dual tone multi-frequency signaling or its functional equivalent;
- iv. Single-party service or its functional equivalent;
- v. Access to emergency services;
- vi. Access to operator services;
- vii. Access to interexchange service;
- viii. Access to directory assistance; and
- ix. Toll limitation for qualifying low-income consumers.

It is ORS's position that an ETC in this state must provide all (or substantially all) of the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services." The Company has failed to demonstrate that it will provide all of the nine required services in compliance with the Federal Communication Commission's ("FCC's") regulations.

As grounds for this Motion, ORS states as follows:

**1. LifeConnex's "Implementation Plan" is significantly altered from its Application filed on October 5, 2009 and fails to meet the requirements of 47 C.F.R. 54.201(d)1.**

LifeConnex, in its Application, claimed that it would provide facilities-based service "using facilities obtained as UNEs" from AT&T. (Application at page 5, section 5). As explained later in this Motion, the Company now appears to have a different business plan, one that fails to meet the requirements of 47 C.F.R. 54.201(d)1.

This new approach, which LifeConnex proposed through responses to questions from ORS and in a meeting on June 23, 2010 where members of ORS met with LifeConnex's management team, is different than the plan proposed in its Application and its prefiled direct

testimony. LifeConnex has failed to provide evidence that its new implementation plan meets the FCC's facilities-based requirements found in 47 C.F.R. 54.201(d)1.

Through responses to data requests propounded by ORS, and further revealed in the June 23rd meeting, LifeConnex has proposed a new approach to offering facilities-based service; an approach not found in its Application, or in the testimony of Paul Watson, and one that the Company has not received approval for from the FCC. This new approach uses no Company-owned local facilities or local facilities of the Incumbent LEC purchased as unbundled network elements ("UNE"), and most importantly, it does not use a combination of its own facilities and resale of another carrier's services in offering the services that are supported by federal universal service support mechanisms.<sup>2</sup> As such, ORS cannot find any evidence that this new approach complies with either the letter or the intent of 47 C.F.R. 54.201(d)(1).

The FCC envisioned carriers would use UNEs as a stepping stone, giving new entrants to the local marketplace a method to start first by buying unbundled network elements from the incumbent LEC and then adding components of their own network as they built out toward the end user. The FCC recognized that a company could startup by purchasing UNEs for each of its customers, thus leasing its own local network, and this would satisfy the facilities-based requirement. Without purchasing UNEs, leasing the local loop, or providing its own local loop, ORS submits that LifeConnex does not meet the requirements of 47 C.F.R. 54.201(d)(1).<sup>3</sup>

**2. The Company relies exclusively on resale to provide the services supported by Federal universal service support.**

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<sup>2</sup> While LifeConnex's new approach may provide one or possibly two of the ancillary supported services, its approach fails to provide the primary supported service, local service, in compliance with the facilities-based requirements of 47 C.F.R. 54.201 (d)(1).

ORS cannot substantiate that LifeConnex will offer basic local exchange service through a combination of its own facilities and resale of another carrier's services as required by 47 C.F.R. 54.201(d)(1). A state commission shall not designate as an ETC a carrier that offers the services supported by federal universal service support mechanisms exclusively through resale. See 47 C.F.R. 54.201(i).

Based on information obtained at the June 23rd meeting, the Company apparently intends to either: (1) place a de minimus number of orders for UNE combinations (although ORS can find no evidence that the Company has ever ordered UNEs or the loop/port combination); or (2) use long distance switches which the Company asserts provide "supported services" and meets the requirements of Section 54.201(d)(1). Yet, as described further below, LifeConnex's explanation of its facilities-based service model is a constantly moving target.

In contrast to the information provided to ORS at the June 23, 2010 meeting, the Company's testimony relies on the purchase of the port/loop combination to meet the FCC's "facilities" requirement. Mr. Watson states in his prefiled testimony that LifeConnex has an interconnection agreement with BellSouth/AT&T.<sup>4</sup> (Test. p. 4, lines 14-16). During the course of ORS's investigation, ORS inquired about this interconnection agreement. On April 6, 2010, the Company and AT&T submitted for approval an interconnection agreement, which was approved by the Commission on April 21, 2010, in Docket No. 2010-136-C.

Further, Mr. Watson states in his prefiled testimony that LifeConnex offers the supported services either through the purchase of switched port/loop combinations or through resale of another carrier's services, depending upon the type of service requested and the precise location of the customer. (Test. pgs. 11, lines 2-16; see also, Test. pgs. 4-5 and footnote 8 of the

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<sup>4</sup> On the other hand, the Company responded on April 29, 2010 to information request number 3.6 that it planned to add South Carolina as an addendum to its southeast agreement.



Company's Application). Mr. Watson goes on to explain that UNEs meet the FCC's definition of "own facilities" and "thereby make the method by which LifeConnex provisions the supported services consistent with the FCC's rules found at 47 C.F.R. § 54.201(d)(1) through (i)." As a result of the Triennial Review Remand Order<sup>5</sup> ("TRRO"), switching is no longer subject to Total Element Long Run Incremental Cost pricing and consequently the only way to obtain a "port/loop combination" from AT&T is through a commercial agreement. In response to an ORS information request, AT&T has confirmed that LifeConnex does not have a commercial agreement with AT&T for port/loop combinations. (See Exhibit 2, Response 1-4).

Later, on March 22, 2010, in response to information request number 2.1 attached as Exhibit 3, the Company states that it does not plan to utilize any UNE platform of the incumbent carrier but rather the facilities of 321 Communications. 321 Communications is not certified by this Commission to provide telecommunications services in the state of South Carolina. In response to information request number 2.9, the Company responded that it does not plan to offer Lifeline discounted local service through the purchase of AT&T UNEs. (See Exhibit 4). Furthermore, in response to information request 2.11, the Company stated that out of 23,796 lifeline customers in Alabama, all are served via resold AT&T local service. In responses to information requests 2.13 and 3.1, the Company indicated that all customers are resale and none are served via UNEs. (See Exhibit 5).

ORS learned through response number 3.3 on April 29, 2010, that the Company's interpretation of 47 C.F.R. 54.201(d)(1) is that it would meet the FCC's facilities requirement by obtaining "facilities via 321 Communications their Long Distance provider as every line is provisioned with this long distance services." (See Exhibit 6). Nowhere in Mr. Watson's

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<sup>5</sup> *In re Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("Triennial Review Remand Order," or "TRRO").

prefiled direct testimony or in the Company's Application is this argument advanced. To aid in resolving the apparent discrepancies, ORS requested at the June 23, 2010 meeting information such as but not limited to call flow diagrams detailing how each supported service will be provisioned.<sup>6</sup> As of the date of this filing, ORS has not received that information.

**3. ORS has received contradictory responses from the Company during the course of ORS's review of the Company's application.**

Mr. Watson states in his February 8, 2010 prefiled testimony that LifeConnex has not been audited by USAC, or any other entity, with regard to Lifeline and Link-Up. (Test. p.19, lines 2-4). ORS representatives have reviewed the filings of LifeConnex in other jurisdictions as well as at the FCC and have spoken to individuals at the Universal Service Administration Company ("USAC"). Thus, ORS was made aware through those conversations that the Company is currently being audited by USAC. During the June 23, 2010 meeting, ORS was informed that the USAC audit had been going on for approximately three (3) years, which is inconsistent with the prefiled testimony. ORS was also informed by the Company at the June 23, 2010 meeting that the results of USAC's audit will be released in July/August of 2010. ORS is concerned that the Company stated in its prefiled testimony that it was not subject to an audit by USAC when in fact it had been subject to an audit for three years.

**4. The Company is not currently in compliance with Commission rules and regulations.**

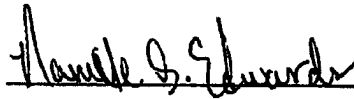
As of today's date, Lifeconnex has not submitted its USF contribution report, which was due July 1, 2010. ORS has concerns as to whether Lifeconnex is willing and able to comply with Commission rules and regulations.

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<sup>6</sup> See also, discussion of FCC's facilities requirement in Florida Staff Recommendation in Docket No. 070348-TX attached as Exhibit 7.

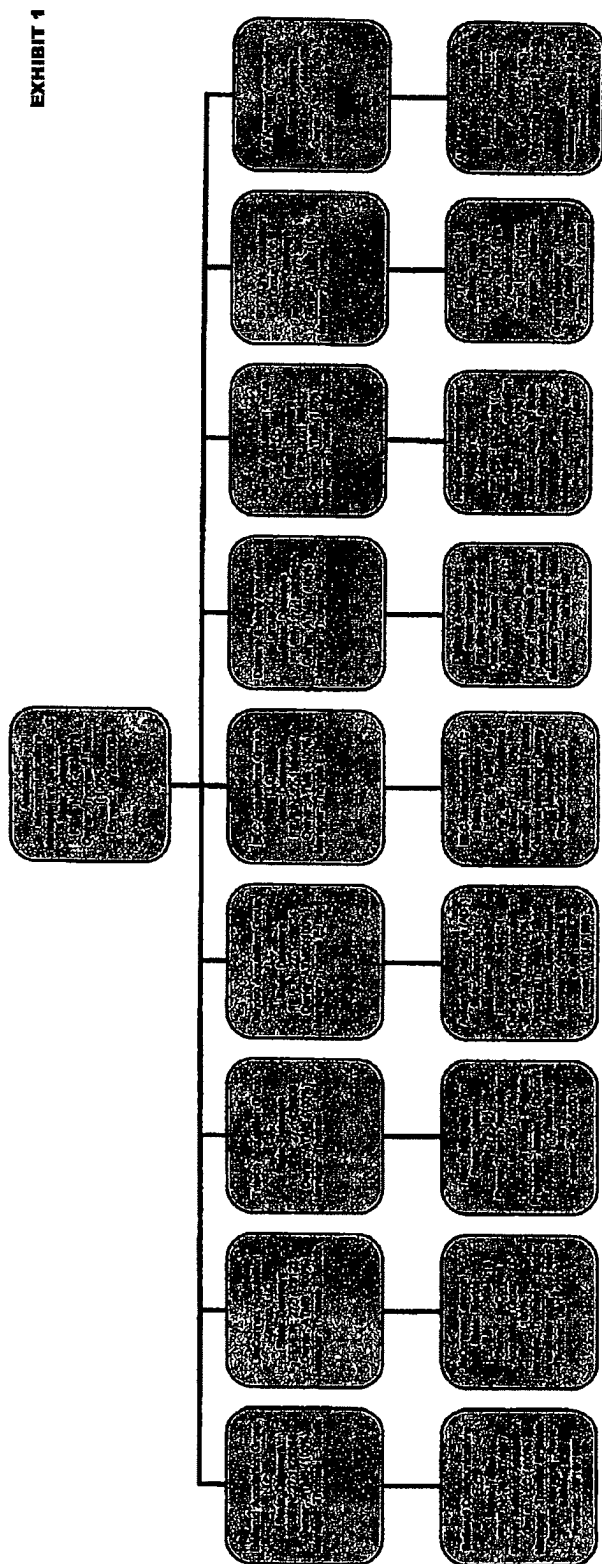
WHEREFORE, for all the reasons set forth above, ORS finds that granting the Company's application is not in the public interest and respectfully requests the Commission to dismiss this Application for ETC designation. Should the Commission decide to deny ORS's request, ORS asks that this Commission delay any hearings in this matter until after USAC releases its audit findings.

Respectfully submitted,



Nanette S. Edwards, Esquire  
**Office of Regulatory Staff**  
1401 Main Street, Suite 900  
Columbia, SC 29201  
Phone: (803) 737-0575  
Fax: (803) 737-0895  
Email: nsedwar@regstaff.sc.gov

July 7, 2010





Cindy Cox

AT&T South Carolina  
1600 Williams Street  
Suite 5470  
Columbia, SC 29201

**EXHIBIT 2**

T: 803.401.2252  
F: 803.771.4680  
cc2283@att.com  
www.att.com

June 25, 2010

Ms. Nanette Edwards  
Office of Regulatory Staff  
1401 Main St., Suite 900  
Columbia, SC 29201

Dear Ms. Edwards:

This letter and its attachments respond to the Information Request, dated June 14, 2010, that the Office of Regulatory Staff propounded to AT&T South Carolina pursuant to S.C. Code Ann. §58-4-55. One or more of the attachments are considered proprietary and are stamped "Confidential/Proprietary Information Pursuant to S.C. Code Ann. Section 58-4-55-C".

- 1-1. Please identify and provide guidebook references to all toll blocking (which allows customers to block outgoing toll calls) and toll control (which allows customers to limit in advance their toll usage per month or per billing cycle) functionality that AT&T South Carolina offers its retail residential customers.**

AT&T South Carolina does not offer toll control to its retail residential customers. AT&T South Carolina offers its retail residential customers the toll blocking functionality provided by the four customized code restriction options (coded CREX1, CREX2, CREX3, and CREX4) described at §§A13.20.2.A.1 to .4 of its General Exchange Price List ("GEPL"). The retail non-recurring and recurring prices for these customized code restrictions are set forth in §§A13.20.3.A.1 to .4 of its GEPL. Exhibit A to this response is a copy of these sections.

- A. Are the rates, terms, and conditions of the items identified in response to Request No. 1 different for retail customers who qualify for Lifeline than for retail customers who do not qualify for Lifeline?**

Yes. Retail customers who qualify for Lifeline and who order the customized code restriction options identified in response to Request No. 1-1 receive those options free of charge. See Exhibit A, §A13.20.1.H ("Customized Code Restriction will be established and provided at no charge for customers receiving Lifeline service from A3.31 . . ."); Exhibit B, §A3.31.2.A.4 ("Toll blocking, if elected, will be provided at no charge to the Lifeline subscriber.").

be adjusted to equal the total of the non-discounted local service rates and charges." See Exhibit B.

In states in which AT&T does not recover the \$3.50 state credit amount from an external source, it does not provide the \$3.50 state credit amount to resellers.

**B. to CLECs operating under a commercial agreement?**

AT&T does not know whether any CLEC with a commercial agreement provides Lifeline discounts to its end users, and AT&T is unaware of any CLEC with a commercial agreement having raised any Lifeline issues, including without limitation passing along Lifeline credits, with AT&T.

**1-4. Does Lifeconnex have a commercial agreement with AT&T? No.**

**1-5. Does Bellerud have a commercial Agreement with AT&T? No.**

**1-6. To what extent does AT&T pass along Linkup credits:**

**A. to resellers**

The Link-Up program is designed to increase the availability of telecommunications services to low income subscribers by providing a credit to the non-recurring installation and service charges to qualifying residential subscribers. The credit, which AT&T recovers from the federal USF, currently is fifty percent of the non-recurring charges for connection of service, up to a maximum of thirty dollars.

As explained in §A4.7.2.A.6 of the GEPL, "[t]he non-discounted federal credit amount will be passed along to resellers ordering local service at the prescribed resale discount from this Tariff, for their eligible end users. Eligible carriers, as defined by the FCC, are required to establish their own Link-Up programs." See Exhibit D.

**B. to CLECs operating under a commercial agreement?**

AT&T does not know whether any CLEC with a commercial agreement provides Linkup discounts to its end users, and AT&T is unaware of any CLEC with a commercial agreement having raised any Linkup issues, including without limitation passing along Linkup credits, with AT&T.

**1-7 Provide the amounts AT&T is reimbursed by USAC for the items identified in 1-1.**

**EXHIBIT 3**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
STAFF'S SECOND AUDIT INFORMATION REQUEST TO  
LIFECONNEX TELECOM, LLC ("LIFECONNEX")  
Docket No. 2009-414-C  
March 22, 2010**

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- 2.1 Does LifeConnex provide (or plan to provide) any services in South Carolina through the use of its own facilities or unbundled network elements?
- a. If LifeConnex provides or plans to provide service using its own facilities, provide a listing of all LifeConnex telecommunications equipment located in South Carolina.
  - b. Identify the criteria used by LifeConnex to determine when and where unbundled network elements are purchased and used to provide service.

**RESPONSE:**

**Yes.**

**a. No facilities will be based in SC currently.**

**b. LifeConnex does not plan to utilize any UNE platform of the incumbent carries but rather the facilities of 321 Communications.**

**All Contacts Providing Information/Response for the above question:**

**Edward Heard, General Manager, LifeConnex Telecom, LLC, 13700 Perdido Key Drive, Unit B222, Pensacola, Florida 32507; E-mail: [ehheard@lifeconnex.net](mailto:ehheard@lifeconnex.net); Telephone: (877) 246-1606**

**Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: [lsteinhart@telecomcounsel.com](mailto:lsteinhart@telecomcounsel.com); Telephone: (770) 232-9200**

**EXHIBIT 4**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
STAFF'S SECOND AUDIT INFORMATION REQUEST TO  
LIFECONNEX TELECOM, LLC ("LIFECONNEX")  
Docket No. 2009-414-C  
March 22, 2010**

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- 2.9 Does LifeConnex plan to offer Lifeline discounted local service through the purchase of AT&T unbundled network elements?
- a) If the answer is "yes," will the service include toll limitation service or toll blocking?
  - b) If the answer to a) is "yes," does LifeConnex plan to request TLS disbursements for its UNE-based, Lifeline discounted local service?

**RESPONSE:**

**No. (TLS can also be provided via Resale and facilities.)**

**All Contacts Providing Information/Response for the above question:**

Edward Heard, General Manager, LifeConnex Telecom, LLC, 13700 Perdido Key Drive, Unit B222, Pensacola, Florida 32507; E-mail: [ehheard@lifeconnex.net](mailto:ehheard@lifeconnex.net); Telephone: (877) 246-1606

Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: [lsteinhart@telecomcounsel.com](mailto:lsteinhart@telecomcounsel.com); Telephone: (770) 232-9200



**EXHIBIT 5**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
STAFF'S SECOND AUDIT INFORMATION REQUEST TO  
LIFECONNEX TELECOM, LLC ("LIFECONNEX")  
Docket No. 2009-414-C  
March 22, 2010**

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- 2.11 Provide the number of Lifeline customers LifeConnex (Swiftel, LLC) serves in Alabama.
- a) How many of these Lifeline customers are provided service through the use of UNEs?
  - b) How many of these Lifeline customers are served through resold AT&T (or other ILEC) local service?

**RESPONSE:**

**In January, LifeConnex requested Lifeline subsidy for 23,796 customers.**

- a. None**
- b. 23,796**

**All Contacts Providing Information/Response for the above question:**

**Edward Heard, General Manager, LifeConnex Telecom, LLC, 13700 Perdido Key Drive,  
Unit B222, Pensacola, Florida 32507; E-mail: [ehheard@lifeconnex.net](mailto:ehheard@lifeconnex.net); Telephone: (877) 246-  
1606**

**Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite  
115, Alpharetta, Georgia 30005; E-mail: [lsteinhart@telecomcounsel.com](mailto:lsteinhart@telecomcounsel.com); Telephone: (770)  
232-9200**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
STAFF'S SECOND AUDIT INFORMATION REQUEST TO  
LIFECONNEX TELECOM, LLC ("LIFECONNEX")**

**Docket No. 2009-414-C**

**March 22, 2010**

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**2.13 Referring to ORS's first Audit Information Request, question 1-6:**

- a) LifeConnex's answer to this question was incomplete. Provide the methods used to provide Lifeline discounted service in Alabama, Kansas, Kentucky, New York, and North Carolina. i.e.: via UNEs or via resale.**
- b) For each of the states listed in a), how many Lifeline customers are served via UNEs?**
- c) For each of the states listed in a), how many Lifeline customers are served via resale?**

**RESPONSE:**

**a. All subscribers will be provisioned on the incumbent carrier's resale platform along with the utilization of 321Communications facilities. In the Northeast Verizon area LifeConnex will also utilize the UNE platform with 321 Communications facilities.**

**b. Currently none of the customers are on a UNE platform with an incumbent carrier. However, most customers are utilizing facilities through 321Communications.**

**c. Currently all customers are on resale.**

**All Contacts Providing Information/Response for the above question:**

**Edward Heard, General Manager, LifeConnex Telecom, LLC, 13700 Perdido Key Drive, Unit B222, Pensacola, Florida 32507; E-mail: eheard@lifeconnex.net; Telephone: (877) 246-1606**

**Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: [lsteinhart@telecomcounsel.com](mailto:lsteinhart@telecomcounsel.com); Telephone: (770) 232-9200**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
STAFF'S THIRD AUDIT INFORMATION REQUEST TO  
LIFECONNEX TELECOM, LLC ("LIFECONNEX")  
Docket No. 2009-414-C  
April 29, 2010**

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- 3.1 In each state where LifeConnex offers Lifeline service specify the number of customers served via:
- a. Unbundled Network Elements
  - b. Resale of ILEC local service

**RESPONSE:**

- a. No Unbundled Network Elements
- b. Alabama – 25,755  
Kentucky – 4,341  
North Carolina – 6,931

**All Contacts Providing Information/Response for the above question:**

Edward Heard, General Manager, LifeConnex Telecom, LLC, 13700 Perdido Key Drive, Unit B222, Pensacola, Florida 32507; E-mail: [ehheard@lifeconnex.net](mailto:ehheard@lifeconnex.net); Telephone: (877) 246-1606

Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: [lsteinhart@telecomcounsel.com](mailto:lsteinhart@telecomcounsel.com); Telephone: (770) 232-9200

**EXHIBIT 6**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
STAFF'S THIRD AUDIT INFORMATION REQUEST TO  
LIFECONNEX TELECOM, LLC ("LIFECONNEX")**

**Docket No. 2009-414-C**

**April 29, 2010**

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- 3.3 In response to ORS Data Request No. 1-9, LifeConnex appears to indicate that the company cannot provide facilities based service at this time. Since 47 C.F.R. 54.201 (d)(1) requires ETCs to use either their own facilities or a combination of its own facilities and resale of another carrier's services, then how can the SC PSC approve LifeConnex's request?

**RESPONSE:** Lifeconnex will provide facilities via 321 Communications their Long Distance provider as every line is provisioned with this long distance service. Therefore Lifeconnex is in fact able to provide facilities based service with every line at this time.

All Contacts Providing Information/Response for the above question:

Edward Heard, General Manager, LifeConnex Telecom, LLC, 13700 Perdido Key Drive, Unit B222, Pensacola, Florida 32507; E-mail: [cheard@lifeconnex.net](mailto:cheard@lifeconnex.net); Telephone: (877) 246-1606

Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: [lsteinhart@telecomcounsel.com](mailto:lsteinhart@telecomcounsel.com); Telephone: (770) 232-9200

**EXHIBIT 7**

State of Florida



**Public Service Commission**

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

**DATE:** June 4, 2009

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Regulatory Compliance (Polk, Casey)  
Office of the General Counsel (Murphy)  
Division of Service, Safety & Consumer Assistance (Moses)

**RE:** Docket No. 070348-TX - Amended petition for designation as eligible telecommunications carrier (ETC) by Swiftel, LLC.

**AGENDA:** 06/16/09 - Regular Agenda - Proposed Agency Action - Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Skop

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RCP\WP\070348.RCM.DOC

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**Case Background**

On May 30, 2007, Swiftel LLC (Swiftel) petitioned the Florida Public Service Commission (FPSC or Commission) for designation as an Eligible Telecommunications Carrier (ETC) in the State of Florida. Specifically, Swiftel is requesting that it be granted ETC status throughout the non-rural wire centers of BellSouth/AT&T (AT&T) and Verizon (Attachment B) for purposes of receiving federal universal service support. Swiftel has consummated interconnection agreements with both AT&T and Verizon. The company maintains that it will only be seeking low income support, and that it will not be requesting high-cost support from the federal Universal Service Fund (USF). Swiftel's primary purpose in requesting ETC status in Florida is to provide Lifeline and Link-Up services.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Docket No. 070348-TX

Date: June 4, 2009

Swiftel is a limited liability company organized under the laws of the State of Florida on August 18, 2006, under the name Swiftel, LLC. The company currently is certificated to provide telecommunication services in the State of Florida through certificate number 8682.<sup>1</sup> The principal office of the company is located at 811 West Garden Street, Pensacola, Florida 32507.

Upon designation as an ETC, Swiftel indicates that it will participate in and offer Lifeline and Link-Up programs to qualified low-income consumers. Additionally, Swiftel has committed to publicize the availability of Lifeline and Link-Up services in a manner reasonably designed to reach those likely to qualify for those services.

On August 7, 2008, staff filed a recommendation to deny Swiftel ETC status for failing to be in the public interest based on the following six reasons:

- (1) Swiftel had not paid its Florida regulatory assessment fee (RAF) for 2007.<sup>2</sup>
- (2) Swiftel did not accurately respond to staff's data request asking Swiftel to provide its corporate structure.
- (3) Swiftel did not accurately respond to staff's data request asking Swiftel to provide a list of Swiftel owners or corporate officers and indicate if any are also owners or corporate officers of any other telecommunication companies.
- (4) Swiftel did not accurately respond to staff's data request by failing to disclose its Oregon Certificate of Authority to Provide Telecommunications Service had been cancelled.
- (5) Swiftel did not accurately respond to staff's data request by failing to disclose Angie M. Franco (now Angie M. Watson, President of Swiftel), as Operating Manager of Seven Bridges Communications, LLC, abandoned its Petition for ETC Status in the State of South Carolina.
- (6) Swiftel did not accurately respond to staff's data request by failing to disclose that its ETC Petition in the State of Montana was dismissed.

Scheduled for the August 19, 2008 Agenda, the recommendation addressing Swiftel's petition for ETC status was postponed by a request from the company to answer and correct what Swiftel considered items that it needed to revisit.<sup>3</sup> Staff arranged a meeting with the attorneys representing Swiftel and the President and Managing Partner for Swiftel, Ms. Angie Watson, on September 9, 2008, to discuss various items. In the meeting, Swiftel indicated that inaccurate information had previously been submitted on its behalf by its counsel, and that it retained Foley & Lardner LLP as new counsel for this docket.

Swiftel requested that it be allowed to file an Amended Petition for designation as an ETC in Florida. Staff agreed to the request based on Swiftel's claims of inaccurate information

<sup>1</sup> Staff's investigation revealed that Swiftel changed its corporate name to LifeConnex Telecom, LLC on April 2, 2009, with the Florida Department of State, Division of Corporations. No request for a name change has been received by the FPSC to date.

<sup>2</sup> Swiftel subsequently paid its 2007 RAF and \$500 penalty on August 13, 2008.

<sup>3</sup> Swiftel LLC's request for postponement, filed August 14, 2008, Document No. 07321-08.

Docket No. 070348-TX

Date: June 4, 2009

that was supplied to staff's responses by Swiftel's original counsel,<sup>4</sup> and an Amended Petition was submitted on November 18, 2008. Staff sent out additional data requests on December 12, 2008, based on the Amended Swiftel Petition. Staff postponed the filing of this recommendation twice since the Amended Petition was filed due to Swiftel's requests for additional time to respond and provide documentation to staff's data requests.

Swiftel stated as of January 1, 2009, it served 1,051 Florida residential customers on a prepaid basis. Swiftel has no commercial customers. Swiftel stated that if granted ETC status, it will provide local exchange and exchange access services in the requested designated service areas using a combination of resale and wholesale local platform (WLP)/unbundled network element (UNE) lines. According to FCC rules, facilities obtained as WLP/UNE lines satisfy the requirement that an ETC provide the supported services using its own facilities.

Swiftel signed an Affidavit attesting that it will follow all Florida Statutes, Florida Administrative Rules, Florida PSC Orders, FCC Rules, FCC Orders, and regulations contained in the Telecommunications Act of 1996 regarding Universal Service, ETCs, Link-Up and Lifeline, and toll limitation service. (Attachment A)

This recommendation addresses Swiftel's Petition for ETC designation in the State of Florida. The Commission has authority under Section 364.10(2), Florida Statutes, to decide a petition by a CLEC seeking designation as an eligible telecommunications carrier pursuant to 47 C.F.R. § 54.201.

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<sup>4</sup> Although Swiftel stated that its counsel submitted inaccurate information to the Florida PSC, it continues to use his firm for filings in Florida and other states.

Docket No. 070348-TX  
Date: June 4, 2009

#### **Discussion of Issues**

**Issue 1:** Should Swiftel be granted eligible telecommunications carrier status in the State of Florida?

**Recommendation:** No. Staff recommends that Swiftel not be granted eligible telecommunications carrier status in the State of Florida. (Polk, Casey, Moses, Murphy)

**Staff Analysis:** Under FCC rules, state commissions have the primary responsibility to designate providers as ETCs.<sup>5</sup> Section 364.10(2)(a), Florida Statutes, provides that "... For the purposes of this section, the term 'eligible telecommunications carrier' means a telecommunications company, as defined by Section 364.02, Florida Statutes, which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. §54.201."

Designation as an ETC is required for a provider to be eligible to receive monies from the federal USF. 47 USC 254(e) of the Act provides that "only an eligible telecommunications carrier designated under Section 214(e)... shall be eligible to receive specific federal universal service support." Pursuant to Section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout a designated service area.

#### **ETC Certification Requirements**

The Code of Federal Regulations addresses a state commission's responsibilities related to an ETC designation:<sup>6</sup>

Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the state commission shall find that the designation is in the public interest.

The FCC has found that the public interest concerns existing for carriers seeking ETC designation in areas served by rural carriers also exist in study areas served by non-rural carriers and that before designating an ETC, whether the applicant seeks designation in an area served by

<sup>5</sup> 47 U.S.C. § 214(e)(2), 47 C.F.R. § 54.201(b).

<sup>6</sup> 47 C.F.R. § 54.201(c)



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a rural or non-rural carrier, it must make an affirmative determination that such designation is in the public interest.<sup>7</sup>

To qualify as an ETC, a carrier must provide nine services identified in 47 CFR 54.101 either using its own facilities or a combination of its own facilities and resale of another carrier's services. The services are:

- (1) Voice grade access to the public switched network;
- (2) Local Usage;
- (3) Dual tone multi-frequency signaling or its functional equivalent;
- (4) Single-party service or its functional equivalent;
- (5) Access to emergency services;
- (6) Access to operator services;
- (7) Access to interexchange service;
- (8) Access to directory assistance; and,
- (9) Toll limitation for qualifying low-income consumers.

ETCs must also advertise the availability of such services and the associated charges using media of general distribution.

**Additional ETC Certification Requirements**

In addition to requiring the above services, the FCC, on March 17, 2005, issued a Report and Order that established additional criteria that all ETC applicants must satisfy in order to be granted ETC status by the FCC.<sup>8</sup> In this Order, the FCC determined that an ETC applicant must also demonstrate:

- (1) a commitment and ability to provide the supported services throughout the designated area;
- (2) the ability to remain functional in emergency situations;
- (3) ability to satisfy consumer protection and service quality standards;
- (4) provision of local usage comparable to that offered by the incumbent LEC; and,
- (5) an acknowledgement that the applicant may be required by the FCC to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to Section 214(e)(4) of the Act.

The FCC encouraged states to also adopt these criteria, and the FPSC has done so by Order No. PSC-05-0824-TL, issued August 15, 2005, in Docket No. 010977-TL.

<sup>7</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order FCC 05-46, ¶ 42, Released: March 17, 2005.

<sup>8</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order FCC 05-46, Adopted: February 25, 2005, Released: March 17, 2005.

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**Swiftel Compliance with ETC Requirements**

Staff believes that Swiftel fails to comply with two of the requirements identified above. Staff believes Swiftel has failed to fulfill the facilities' requirements of 47 CFR §54.201(d)(1). Additionally, staff believes it would not be in the public interest to grant Swiftel ETC status in Florida. Both of these requirements will be addressed below.

**Facilities Requirement**

On April 16, 2009, Swiftel filed documents with the Commission asserting that it will fulfill the facilities requirement of 47 C.F.R. §54.201(d)(1) in Florida by using *Session Initiation Protocol* (SIP) signaling protocol to supply at least one of the nine required services to its customers. SIP is a signaling protocol used for establishing communication sessions within an IP based network, similar to SS7 signaling protocol within the Public Switched Telephone Network. SIP is an Internet signaling protocol service, not a "physical component of the telecommunications network."

47 CFR §54.201(d), provides that:

A common carrier designated as an eligible telecommunications carrier under this section shall be eligible to receive universal service support in accordance with section 254 of the Act and shall, throughout the service area for which the designation is received:

(1) Offer the services that are supported by federal universal service support mechanisms under subpart B of this part and section 254(c) of the Act, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier). (emphasis added)

47 CFR §54.201(e) and (f), further defines the term "facilities:"

(e) For the purposes of this section, the term *facilities* means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part. (emphasis added)

(f) For the purposes of this section, the term "own facilities" includes, but is not limited to, facilities obtained as unbundled network elements (UNE) pursuant to part 51 of this chapter, provided that such facilities meet the definition of the term "facilities" under this subpart. (emphasis added)

A common carrier can be designated as an ETC if it has the ability to offer the services supported by federal universal service support mechanisms such as having an existing

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interconnection agreement with an underlying carrier.<sup>9</sup> However, universal service support is only provided to the ETC upon provision of the supported services to consumers.<sup>10</sup> An ETC cannot receive universal service support if it is a pure reseller. 47 CFR §54.201(i), provides that:

A state commission shall not designate as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier's services.

Swiftel filed a petition for ETC designation in Alabama in January 2008, and stated that it offers all of the supported services under section 254(c) using facilities obtained as UNEs from AT&T. The Alabama PSC Order designating Swiftel as an ETC specifically states that Swiftel will offer the ETC required services using its own facilities or a combination of its own facilities and the resale of another carrier's services. However, Swiftel has apparently not done so. In a data request response to staff, Swiftel indicated that it had not purchased any UNEs from AT&T or CenturyTel in the State of Alabama. Swiftel has advised staff that it uses SIP IP Protocol service to fulfill the facilities requirement in Alabama. SIP is a service purchased by Swiftel, it is not a physical component of the telecommunications network. Swiftel is not fulfilling the facilities requirement by purchasing SIP service. It is therefore providing ETC services in Alabama using 100% resale services. Since a pure reseller cannot receive universal service funding, staff believes Swiftel is in violation of 47 CFR §54.201(i).

Staff further investigated how Swiftel will meet the facilities requirement in Florida. Swiftel responded that it owns facilities in Atlanta which provide at least one of the required services to customers. As evidence of meeting the facilities requirement, Swiftel filed documents showing it will provide at least one of the required nine ETC services using SIP service. SIP is a signaling protocol service of an IP-based network. It is not a physical component of the telecommunications network as required by 47 CFR §54.201(e).

The FCC requires that "facilities" must be physical components of the telecommunications network. In Order FCC 97-197, the FCC stated:

By encompassing only physical components of the telecommunications network that are used to transmit or route the supported services, this definition, in effect, excludes from eligibility a "pure" reseller that claims to satisfy the facilities requirement by providing facilities through its own billing office or through some other facility that is not a "physical component" of the network, as defined in this Order. We find that our determination to define "facilities" in this manner is consistent with congressional intent to require that at least some portion of the

<sup>9</sup> "A carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and then must provide the designated services to customers pursuant to the terms of Section 214(e) in order to receive support." Universal Service Order, 12 FCC Rcd 8853, FCC 97-157, ¶ 137.

<sup>10</sup> In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, FCC 00-248, ¶15, Released August 10, 2000.

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supported services offered by an eligible carrier be services that are not offered through "resale of another carrier's services."

Swiftel is asserting that SIP service meets the facilities requirement of the federal rules. Staff disagrees. SIP is a purchased IP protocol service. It is not a physical component of the telecommunications network. Staff believes Swiftel is attempting to stretch the FCC definition of facilities to meet its own needs. The FCC did not want states to interpret the term "own facilities" and included the following clarification in the Universal Service Order to avoid conflicting interpretations:

It is clearly appropriate for a federal agency to interpret the federal statute that it has been entrusted with implementing. Moreover, we believe it is particularly important for us to set out a federal interpretation of the "own facilities" language in section 214, particularly as it relates to the use of unbundled network elements. We note that the "own facilities" language in section 214(e)(1)(A) is very similar to language in section 271(c)(1)(A), governing Bell operating company (BOC) entry into interLATA services. While we are not interpreting the language in section 271 in this Order, given the similarity of the language in these two sections, we would find it particularly troubling to allow the states unfettered discretion in interpreting and applying the "own facilities" language in section 214(e). In order to avoid the potential for conflicting interpretations from different states, we believe it is important to set forth a single, federal interpretation, so that the "own facilities" language is consistently construed and applied.<sup>11</sup>

Swiftel is interpreting the phrase "own facilities" to include SIP service. It does not. The FCC was very clear that conflicting interpretations of the "own facilities" language will not be allowed. SIP service does not meet the definition of "own facilities."

#### **Facilities Requirement Summary**

Swiftel has not provided evidence that as an ETC, it would offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services as required by 47 C.F.R. §54.201(d)(1). Swiftel's Alabama petition for ETC status stated it would use UNEs and resale services to fulfill the facilities requirement. However, Swiftel subsequently elected to use a SIP signaling service instead, asserting that the SIP service fulfills the facilities requirement. Staff also determined that Swiftel is using SIP service in Kentucky, asserting that SIP service fulfills the facilities requirement.

Swiftel's ETC petition also states it would use UNEs to fulfill the facilities requirement in Florida, but Swiftel has provided evidence in this docket that it plans to use the SIP signaling service instead. SIP is a signaling protocol used for establishing communication sessions within an IP based network. It is not a "physical component of the telecommunications network" as

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<sup>11</sup> Universal Service Order, 12 FCC Red 8853, FCC 97-157, ¶ 168.

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required by 47 CFR §54.201(e). Therefore, staff recommends that Swiftel does not meet federal and state requirements for being designated as an eligible telecommunications carrier in the State of Florida.

**Public Interest Requirement**

As previously mentioned, the FCC has found that before designating an ETC, it must make an affirmative determination that such designation is in the public interest, regardless of whether the applicant seeks designation in an area served by a rural or non-rural carrier. It found that the public interest concerns that exist for carriers seeking ETC designation in areas served by rural carriers also exist in study areas served by non-rural carriers.<sup>12</sup> Staff believes that before designating a carrier as an ETC, the FPSC should also make an affirmative determination that such designation is in the public interest, regardless of whether the applicant seeks designation in an area served by a rural or non-rural carrier. Staff believes it would not be in the public interest to designate Swiftel as an ETC in Florida based on the following research and responses to staff's data requests:

- Swiftel failed to pay its Florida RAF for 2007 in a timely manner;
- Swiftel has not officially requested a name change from Swiftel to LifeConnex Telecom, LLC, effective April 2, 2009;<sup>13</sup>
- As of April 2, 2009, Swiftel is no longer recognized as a legal corporate name in the State of Florida by the Secretary of State, Division of Corporations;
- Seven Bridges Communications, LLC had its CLEC certificate revoked October 15, 2008 for failure to file annual reports to the South Carolina PSC. The South Carolina PSC order named Angie Watson as Operations Manager;
- Swiftel failed to disclose through staff's data requests that Leonard I. Solt is an owner of TRUE Wireless LLC, a company seeking ETC status in the State of Texas;
- Swiftel's ETC Petition in the State of Montana was dismissed for not complying with Montana laws;
- Swiftel's Oregon Certificate of Authority to Provide Telecommunications Service was cancelled for failing to comply with Commission Rules and Terms of the Certificate for non-payment of regulatory assessment fees;

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<sup>12</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order FCC 05-46, ¶ 42, Released March 17, 2005.

<sup>13</sup> Staff advised Swiftel on May 13, 2009, that companies must petition the Commission for an official name change.

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- Swiftel is not using its own facilities or a combination of its own facilities and resale of another carrier's services to provide at least one of the required ETC services to Lifeline customers in Alabama or Kentucky in violation of federal rules.<sup>14</sup>

**Public Interest Requirement Summary**

Swiftel has failed to comply with FPSC and FCC rules and regulations, made misrepresentations to the FPSC staff, and had regulatory compliance issues in other states. As a result, staff believes that the public interest would not be served by designating Swiftel as an ETC in Florida.

**Conclusion**

Swiftel has provided documentation in this docket, that as an ETC, it would offer the services that are supported by federal universal service support mechanisms using SIP Internet Protocol services. This does not meet the requirements of 47 C.F.R. §54.201(d)(1) which requires that ETCs must offer at least one of the nine required ETC services using its own facilities or a combination of its own facilities and resale of another carrier's services.<sup>15</sup>

Swiftel has shown a history of non-compliance with FCC and FPSC rules and regulations, and made misrepresentations to staff in this docket. Additionally, staff's analysis has shown Swiftel's non-compliance with other states' rules and regulations. Therefore, staff recommends that Swiftel not be granted ETC status in the State of Florida. Declining ETC status to Swiftel will not prevent it from providing Link-Up and Lifeline services to its clients. Swiftel can purchase Link-Up and Lifeline resold services from its underlying carrier and receive the Link-Up and Lifeline USF credits from them.

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<sup>14</sup> Swiftel was granted ETC status in AT&T Alabama's territory on April 15, 2008, and in AT&T's Kentucky territory on January 6, 2009. Since that time, it has collected \$2,258,941 for Alabama, and \$21,410 for Kentucky from the federal universal service fund.

<sup>15</sup> Swiftel stated in its original petition and amended petition for ETC status in Florida that it would offer the nine required ETC services using its own facilities or a combination of its own facilities and resale of another carrier's services as required by 47 C.F.R. §54.201(d)(1).

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**Issue 2:** Should this docket be closed?

**Recommendation:** If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (Murphy)

**Staff Analysis:** At the conclusion of the protest period, if no protest is filed this docket should be closed upon the issuance of a consummating order.

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Date: June 4, 2009

Attachment A

**AFFIDAVIT**

State of Florida  
County of Essex

BEFORE ME, the undersigned authority, appeared Ange Watson  
who deposed and said:

My name is Ange Watson, I am employed by  
Switell LLC located at  
211 W. Sanderson St. Pensacola, FL 32504 as its  
I am an officer of the Company and am authorized to give this  
affidavit on behalf of the Company. This affidavit is being given to support the Eligible  
Telecommunications Carrier petition filed by my Company with the Florida Public Service  
Commission (PSC).

Company hereby certifies the following:

1. Company will follow all Florida Statutes, Florida Administrative Rules, and Florida PSC Orders relating to Universal Service, Eligible Telecommunications Carriers, and the Florida Link-Up and Lifeline Program.
2. Company will follow all FCC rules, FCC Orders, and regulations contained in the Telecommunications Act of 1996 regarding Universal Service, ETCs, Link-Up and Lifeline, and toll limitation service.
3. Company agrees that the Florida PSC may revoke a carrier's ETC status for good cause after notice and opportunity for hearing, for violations of any applicable Florida Statutes, Florida Administrative Rules, Florida PSC Orders, failure to fulfill requirements of Sections 214 or 234 of the Telecommunications Act of 1996, or if the PSC determines that it is no longer in the public interest for the company to retain ETC status.
4. Company understands that if its petition for ETC status is approved, it will be for limited ETC status to provide Link-Up, Lifeline, and toll-limitation service only, and the Company will be eligible only to receive low-income support from the Universal Service Fund.
5. Company understands that it may only receive reimbursement from the Universal Service Administrative company (USAC) for active customer Link-Up and Lifeline access lines which are provided using its own facilities or using access lines obtained as wholesale local platform lines (formerly UNE lines) from another carrier. The Company shall not apply to USAC for reimbursement of Link-Up and Lifeline access lines obtained from an underlying carrier which already receive a Lifeline and/or Link-Up credit provided by the underlying carrier.
6. Company understands that the PSC shall have access to all books of account, records and property of all eligible telecommunications carriers.



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Attachment A

7. Company understands that low income support reimbursed by USAC for toll limitation service is available only for the incremental costs that are associated exclusively with toll limitation service.
8. Company agrees that upon request, it will submit to the PSC a copy of Form 497 forms filed with USAC to:  
Florida Public Service Commission  
Division of Regulatory Compliance, Market Practices Section  
2540 Starnard Oak Drive  
Tallahassee, Florida 32303
9. Company understands that in accordance with the Florida Lifeline program, eligible customers will receive a \$13.50 monthly discount on their phone bill, \$3.50 of which is provided by the BTC, and \$10.00 of which is reimbursable from the Federal Universal Service Fund.

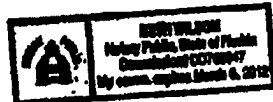
FURTHER AFFIANT SAYETH NOT.

Annie Watson 7/8/08  
Signature Date  
Annie Watson  
Printed Name

Business Address:  
811 W. Garden St  
Pensacola FL 32501

State of FLORIDA  
County of ESCAMPA

Acknowledged before me this 8 day of JULY, 2008 by ANGIE WATSON  
PRESIDENT of Company, who is personally known to me or produced identification and  
who did take an oath.



Beth Wilson  
NOTARY PUBLIC  
BETH WILSON  
Printed Name of Notary

Personally Known  
Produced Identification FLC  
Type of Identification Produced W35013770790

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Date: June 4, 2009

Attachment B

BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	ARCHER	ARCHFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	BOCA RATON	BCRTFLSADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	BROOKSVL	BKVLFLJFDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	BAUDWIN	BLDWFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	BELLEGLADE	BLGLFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	BUNNELL	BNNFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	BRONSON	BRNSFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	BOYNTONBCH	BYBHFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	COCOABEACH	CCBHFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	CEDAR KEYS	CDKYFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	CHEFLAND	CFLDFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	CHEFLEY	CHFLFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	CANTONMENT	CNTMFLLED51
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	COCOA	COCOFLMED50
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	CROSS CITY	CSCYFLBARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	DEBARY	DBRYFLMARS1
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	DELAND	DELNFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	DELRAYBCH	DLRBFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	DELEON SPG	DLEPFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	DUNNELLON	DNLNFLWARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	DEERFLDBCH	DRDBFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	DAYTONABCH	DYBHFLPDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	EAU GARIE	EGLLFLHDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	EASTORANGE	EOANFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	FLAGLERBCH	FLRBFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	FERNADNBCH	FRBHFLFDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	FORTPIERCE	FTPRFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	GREENCYSPO	GCSPFLCDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	GRACEVILLE	GCVLFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	GENEVA	GENVFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	GULFBREEZE	GLBRFLMCD50
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	GAINESVL	GSVLFLNW33E
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	HAVANA	HAVNFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	HOBESOUND	HBSDFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	HOLLEYNVRR	HLNVFLMADS1
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	FTLAUDERDL	FLWDFLPDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	HOLLYWOOD	HLWDFLWHDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	HOMESTEAD	HMSTFLNARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	HAWTHORNE	HWTHFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	JAY	JAYFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	JACKSOLBCH	JBCHFLMA24E
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	JUPITER	JPTRFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	KEYSTN HTS	KYHTFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	LAKE CITY	LKCYFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	LYNN HAVEN	LYHNFLHDS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	MICANOPY	MCNPFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	MIDDLEBURG	MDBGFLPMD50
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	MIAMI	MIAMFLWMD50
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	MELBOURNE	MLBRFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	MILTON	MLTNFLRAD50
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	JACKSONVL	MNDRFLLODS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	JULINGTON	MNDRFLWR50
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	MUNSON	MNSNFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	MAXVILLE	MXVLFLMARS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	NORTH DADE	NDADFLOLD50
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	NWSMYRNBCH	NSBHFLMADS0
BELLSOUTH TELECOMM INC DBA SOUTHERN BELL TEL & TEL	NEWBERRY	NWBRFLMARS0



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**Attachment B**

VERIZON FLORIDA INC.  
VERIZON FLORIDA INC.  
VERIZON FLORIDA INC.  
VERIZON FLORIDA INC.  
VERIZON FLORIDA INC.  
VERIZON FLORIDA INC.

SARASOTA	TAMPFLXAW44
TAMPACEN	TAMPFLXEDS0
TARPONSPG	TREPLXA93H
VENICE	VENCFLXSD60
WINTERHVN	WINDHFLXC29H
ZEPHYRHLS	ZPHYFLXA7EH

## **Exhibit C**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.	DOCKET NO. 100021-TP ORDER NO. PSC-10-0457-PCO-TP ISSUED: July 16, 2010
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The following Commissioners participated in the disposition of this matter:

NANCY ARGENZIANO, Chairman  
LISA POLAK EDGAR  
NATHAN A. SKOP

ORDER GRANTING LIFECONNEX TELECOM, LLC'S REQUEST FOR EMERGENCY  
RELIEF WITH CONDITIONS

BY THE COMMISSION:

CASE BACKGROUND

On January 8, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T") filed a Complaint and Petition for Relief ("Complaint") against LifeConnex Telecom, LLC, f/k/a Swiftel, LLC ("LifeConnex") seeking resolution of billing disputes between LifeConnex and AT&T; determination of the amount LifeConnex owes AT&T under the parties' Interconnection Agreement ("ICA"), and requiring LifeConnex to pay that amount to AT&T. In summary, AT&T alleges that LifeConnex purchases telecommunications services from AT&T for resale to end use consumers. Under the terms of the ICA and federal law, LifeConnex is authorized to apply certain discounts or promotional credits which AT&T applies to its own customers. AT&T alleges that LifeConnex improperly calculates the amount of discounts or credits it is entitled to. AT&T also alleges that LifeConnex fails to pay disputed amounts owed to AT&T, as required by the ICA, and rather deducts the amounts in dispute from its payments, in violation of the terms of the ICA.

On February 25, 2010, LifeConnex filed its Answer, Affirmative Defenses, and Counterclaims ("Answer") to AT&T's Complaint. In its Answer, LifeConnex alleges that it is entitled under federal law to the same discounts and promotional credits AT&T offers its own retail customers, and as a result, AT&T in fact owes significant sums to LifeConnex, which sums AT&T refuses to pay. LifeConnex raises a number of affirmative defenses and counterclaims. In its Answer, LifeConnex also suggests that we should either dismiss or hold this matter in abeyance pending the results of similar lawsuits pending in Federal court and a Petition pending at the Federal Communications Commission.

After a number of procedural motions, on May 13, 2010, the parties filed a Joint Motion on Procedural Issues, which was followed on June 15, 2010, by a Joint Motion on Procedural

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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DOCKET NO. 100021-TP  
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Schedule (the "Joint Motions"). In the Joint Motions, the parties requested this matter be held in abeyance pending the outcomes of similar suits proceeding to hearing in Alabama, Louisiana, North Carolina, and South Carolina. The Joint Motions were granted by Order No. PSC-10-0402-PCO-TP, issued June 18, 2010, ("Abeyance Order"), which stated in part:

Having reviewed the Joint Motions, I will hold these two Dockets in abeyance pending either resolution of the cases in the states set forth above or the filing of a persuasive motion to resume the dockets. Upon resumption of the dockets, I will consider motions from the parties which take into account intervening events and address both the appropriate scope of the proceedings and the appropriate posture of the proceedings with respect to consolidation. Upon resumption of the Dockets, the parties will be expected to withdraw all moot or superseded motions that are currently pending before this Commission but held in abeyance pursuant to this Order.

On June 21, 2010, AT&T filed a "Notice of Commencement of Treatment Pursuant to Current Interconnection Agreement" ("Notice of Commencement of Treatment"), wherein AT&T notified us that it had sent LifeConnex a letter, informing LifeConnex that unless it paid AT&T all past due balances (the balances at issue in this docket), "AT&T would suspend, discontinue, and/or terminate LifeConnex's service in Florida...." In the letter to LifeConnex, AT&T stated that if a partial payment was not made by July 6, 2010, AT&T would suspend LifeConnex's ability to order new services or make changes to existing lines; and if all past due balances were not paid by July 21, 2010, AT&T would take further action, including discontinuance of service to LifeConnex (and therefore to LifeConnex's end user customers) and/or termination of the ICA with LifeConnex. In the Notice of Commencement of Treatment, AT&T states that suspension, discontinuance, and/or termination are actions authorized by the parties' ICA, and that specific language in Section 1.4 of Attachment 7 to the ICA states "LifeConnex shall make payment to AT&T for all services billed including disputed amounts." AT&T subsequently informed our staff that it had extended the July 6, 2010, suspension date to July 13, 2010.

On July 1, 2010, LifeConnex filed a Request for Emergency Relief ("Emergency Request"), requesting that we issue an order "prohibiting AT&T from suspending, discontinuing, terminating, or otherwise disrupting LifeConnex's service in Florida pending resolution of the disputed matters in this docket." In the Emergency Request, LifeConnex alleges that it is currently providing telecommunications service to over 2,500 Florida customers, the majority of whom are low income, residential customers, through resale of AT&T's facilities. LifeConnex asserts that it is entitled to receive from AT&T the same credits and promotional discounts that AT&T gives to its own retail customers, and that LifeConnex has hired a private firm, Lost Key Telecom, Inc., to keep track of the credits. LifeConnex asserts that it disputes AT&T's claims in AT&T's Complaint filed in this docket, and has agreed with AT&T to the Joint Motions on Procedure and Scheduling.

In the Emergency Request, LifeConnex asks us to prevent AT&T from disrupting LifeConnex's service, including the ordering of new services. LifeConnex states that the parties agreed, and we ordered, that this proceeding would be held in abeyance until proceedings in

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other states are resolved, at which time the instant Florida proceeding may be revived and the matters in dispute resolved. LifeConnex asserts that AT&T's Notice of Commencement of Treatment is contrary to the letter and spirit of the parties' agreement and the Order.

In its Response in Opposition to LifeConnex's Request for Emergency Relief ("Response in Opposition"), filed July 6, 2010, AT&T states that the ICA was approved by operation of law on December 27, 2007, and that the terms of the ICA thus constitute a binding contract between the parties, which we are obligated to enforce under state and federal law. AT&T states that Sections 1.4 and 1.4.1 of Attachment 7 to the ICA require LifeConnex to make payments of all amounts billed, including disputed amounts, on or before the billing due date. AT&T denies that it will owe LifeConnex any amounts at the conclusion of this case. AT&T further alleges that the plain language of the Joint Motions and the Abeyance Order make clear AT&T's Notice of Commencement of Treatment is not barred in any way, and in fact support AT&T's position that LifeConnex must comply with the ICA during the pendency of this dispute. AT&T further argues that AT&T's past conduct in allowing LifeConnex to deduct disputed amounts before paying its bills in no way constitutes a waiver of AT&T's right to enforce the terms of the ICA at this point in time. Finally, AT&T argues that we are without authority to issue injunctive relief, and even were we to have such authority, the facts in this case would not support such extraordinary relief.

Upon receipt of LifeConnex's July 1, 2010, Emergency Request, on July 2, 2010, our staff made contact with both AT&T and LifeConnex. Our staff specifically requested AT&T extend the disconnect date from July 21, 2010 to August 3, 2010, to enable our staff to bring a recommendation to us prior to AT&T taking action. Our staff reiterated this request the following week. After receiving no commitment from AT&T, our staff scheduled a status meeting/conference call on July 9, 2010, with all parties participating. Our staff specifically asked both parties about the status of negotiations between the parties to continue service to LifeConnex after the July 21, 2010, date; the parties' plans for LifeConnex's end use customers if the parties could not reach an agreement and AT&T discontinued service to LifeConnex; and whether AT&T would agree to extend the discontinuance date until August 3, 2010, in order to allow us to hear and consider the Emergency Request at a regularly scheduled Agenda Conference. Our staff was informed that the parties, while continuing to negotiate, did not appear to be close to any kind of agreement regarding continued service to LifeConnex. AT&T's attorneys participating in the status call indicated they had not been authorized to extend the discontinuance deadline until August 3, 2010. Finally, AT&T further indicated that LifeConnex's end-use customers were LifeConnex's, and it was the responsibility of LifeConnex to notify its customers regarding the potential discontinuance of service and assist its customers in finding alternative telecommunications services.<sup>1</sup>

As a result of the failure of the parties to indicate any firm commitment to LifeConnex's end user customers; the apparently negative outlook for a successful resolution to this dispute prior to the July 21, 2010, discontinuance deadline; and the possibly severe effects that discontinuance could have on over 2,500 mostly lifeline pre-paid consumers in this state, our

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<sup>1</sup> AT&T did point out that the discontinuance would result in the access lines remaining "warm;" that is, LifeConnex customers would still have access to 911 emergency service calls even though their phones have no dial-tone.



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staff determined that we should address LifeConnex's Emergency Request prior to the July 21, 2010, discontinuance deadline. Therefore, on July 12, 2010, our staff filed an Emergency Recommendation for the July 13, 2010, regularly scheduled Agenda Conference.

We have jurisdiction pursuant to 47 U.S.C. Section 252 of the Telecommunications Act of 1996 (the Act), Sections 120.80(13)(d) and (e), 364.01 and 364.161, Florida Statutes (F.S.) and Rules 25-22.036 and 28-106.201, Florida Administrative Code (F.A.C.).

#### **REQUEST FOR EMERGENCY RELIEF**

In its Request for Emergency Relief, LifeConnex "asks that the Commission order AT&T to take no actions to suspend or otherwise interfere with LifeConnex's service to its customers pending a final determination by the Commission in the Consolidated Phase of this Docket."

LifeConnex argues three bases for its requested relief: our general authority to protect the public interest, ensure fair competition, and prevent anti-competitive behavior under Section 364.01, F.S.; the Order holding the docket in abeyance; and the terms of the parties' Interconnection Agreement itself.

#### **General Jurisdiction under Section 364.01, F.S.**

LifeConnex asserts that we should take action to prevent AT&T from suspending, discontinuing and/or terminating LifeConnex under our general jurisdiction contained in Section 364.01, F.S.<sup>2</sup> We do not interpret Section 364.01, F.S., as authority to grant the specific relief requested by LifeConnex under these facts.

We agree that we have authority to promote competition and to prevent anti-competitive behavior. But, we also find this authority goes both ways. In this fact pattern, the parties' conduct is governed by an ICA with clear terms. The Federal and Florida statutory schemes regarding telecommunications services allow parties to enter into binding contracts, and expect to have the terms of those contracts enforced bilaterally. We do not find our authority under Section 364.01, F.S., is intended to provide emergency relief when one party seeks to be relieved of its obligations under a negotiated contract in the absence of extraordinary and compelling circumstances.

If LifeConnex's fundamental concern in this docket is AT&T's delay in processing discounts and promotional credits, the ICA provides LifeConnex options for relief – to file a

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<sup>2</sup> LifeConnex does not cite a specific subsection to Section 364.01 in support of its argument. Upon review, we find the following three subsections would be implicated in this matter: our jurisdiction to "[p]rotect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices" 364.01(4)(a); "[e]ncourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services" 364.01(4)(b); and "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint" 364.01(4)(g).

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complaint/petition before us to determine the treatment of disputed amounts. LifeConnex did not avail itself of this remedy, instead resorting to self help. A Petition to determine the correct treatment of discounts and credits is now pending before us, and whenever the parties seek to reinstate the proceeding, we will determine these matters through the hearing process. Given this fact pattern, we do not find that allowing AT&T to take action clearly contemplated by the ICA rises to the level of "anti-competitive" activity or denies "fair competition" sufficient to invoke our general authority under Section 364.01, F.S.

Order Holding Dockets in Abeyance

We do not find the Order Holding Dockets In Abeyance bars this action, and language contained in the Joint Motions themselves supports AT&T's position that the Notice of Commencement of Treatment may proceed independently of the underlying dispute. In the Joint Motion on Issues, the parties specifically included the following language:

5. Nothing in this Joint Motion is intended, or shall be construed, as a waiver of any Party's pending motions, claims, counterclaims or defenses or any Party's right to amend and supplement its claims, counterclaims, or other pleadings, or to pursue any issue, claim, or counterclaim that is not addressed in the Consolidated Phase in each Party's respective docket, either concurrent with or following the Consolidated Phase, or to seek such other relief as a change in circumstances may warrant.

We find the plain language of the parties' Joint Motion makes clear that the abeyance does not serve as any type of bar to AT&T's Notice of Commencement of Treatment. LifeConnex was a signatory to the Joint Motion, and will not be allowed to argue that its agreed upon language should somehow not be applied, and should instead be either ignored or re-interpreted as a bar to further actions. We therefore find that the terms of the Joint Motion and the Order are controlling, and mean what they say – that the Joint Motions and the Order Granting Abeyance clearly contemplated that neither party was precluded from seeking additional relief.

In addition, we find that the purpose of the underlying "dispute docket" held in abeyance is fundamentally retroactive; that is, it deals with past due sums currently in dispute. We acknowledge that, absent any additional actions, our final decision on the dispute will impact the parties' future relationship, but the majority of the docket deals with prior billings.

On the other hand, the instant Notice of Commencement of Treatment is fundamentally prospective in nature: AT&T is attempting to limit on-going exposure to what could possibly turn out to be unpaid bills for actual services rendered.<sup>3</sup> We find this to be reasonable on AT&T's part. Otherwise, unpaid sums, if any, could continue to accrue for months, and in the

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<sup>3</sup> This determination is based solely on the pleadings to date. It is clear that there is a dispute about whether any sums are due to either party and the amount of those sums. This dispute will only be resolved following an evidentiary hearing and our decision based on the final record. As such, we may substantially depart from our current findings regarding the terms of the ICA and the parties' responsibilities as the record is further developed.

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event we find against LifeConnex, the pleadings reveal no clear evidence that LifeConnex could or would make good on those bills.

Interconnection Agreement

As a third basis for its requested emergency relief, LifeConnex invokes the parties' Interconnection Agreement. Both parties agree that we have authority under state and federal law to enforce the terms of the Interconnection Agreement. The parties also agree that the terms of the ICA control the relationship between the parties. We do find, however, that the plain language in the ICA entitles LifeConnex to the relief it seeks. That is, with respect to the matter before us today, AT&T is entitled under the plain terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment; and that AT&T has not waived its right to take such action.

As noted by AT&T, Sections 1.4 and 1.4.1 of Attachment 7 to the parties' Commission-approved ICA state:

1.4 Payment Responsibility. Payment of all charges will be the responsibility of Swiftel, LLC. Swiftel, LLC shall pay invoices by utilizing wire transfer services or automatic clearing house services. Swiftel, LLC shall make payment to AT&T for all services billed including disputed amounts. AT&T will not become involved in billing disputes that may arise between Swiftel, LLC and Swiftel, LLC's customer. (Emphasis added.)

1.4.1 Payment Due. Payment for services provided by AT&T, including disputed charges, is due on or before the next bill date. Information required to apply payments must accompany the payment. The information must notify AT&T of Billing Account Numbers (BAN) paid; invoices paid and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when the payment and Remittance Information are received by AT&T. If the Remittance Information is not received with payment, AT&T will be unable to apply amounts paid to Swiftel, LLC's accounts. In such event, AT&T shall hold such funds until the Remittance Information is received. If AT&T does not receive the Remittance Information by the payment due date for any account(s), late payment charges shall apply. (Emphasis added.)

We find the plain language of these provisions is clear that while LifeConnex can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA, subject to resolution through the ICA's dispute provisions, or ultimately, our determination. As a result of this language, we find the ICA does not support LifeConnex's Emergency Request.

Exclusive of LifeConnex's arguments regarding the effect of the Joint Motions and Abeyance Order, as well as LifeConnex's waiver argument, discussed below, we also find the plain language of the ICA supports AT&T's right to take the type of action outlined in the Notice of Commencement of Treatment. The language of Sections 1.5 through 1.5.5 of Attachment 7 to the parties' ICA clearly lays out the procedures AT&T is entitled to take in the event of

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LifeConnex's non-compliance with the ICA, including billing provisions. Given our finding (based on the pleadings to date and not prejudging facts that may be developed at hearing) that LifeConnex is not currently complying with the terms of the ICA, and the ICA's language setting forth AT&T's rights, we find no reason to conclude the language of the ICA prohibits the actions set forth in AT&T's Notice of Commencement of Treatment.

LifeConnex's final argument is that AT&T's apparent prior practice of allowing LifeConnex to deduct disputed amounts from payments constitutes a waiver by AT&T of the suspension/discontinuance/termination provisions of the ICA. This is not the case. As pointed out by AT&T in its Response in Opposition, Section 17 of the ICA's General Terms and Conditions states:

17 Non-Waiver A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

We find this "boilerplate" contract term is unambiguous, and clearly allows AT&T the right to fail to enforce provisions in the ICA on a flexible basis, without then being required to waive enforcement of those provisions in the future.

Furthermore, in addition to the plain language of the non-waiver provision, we find the general legal concept of "waiver" is not implicated on these facts. As stated in one legal treatise:

[i]n the case of a true waiver implied in fact from conduct, the intent to waive must be clearly manifested or the conduct must be such that an intent to waive may reasonably be inferred...rather, in the absence of an express declaration manifesting the intent not to claim the right allegedly waived, there must be a clear, unequivocal, and decisive act of the party who is claimed to have waived its rights, so consistent with an intention to waive that no other reasonable explanation is possible. 13 Williston on Contracts Section 39:28 (4<sup>th</sup> edition.)

Under these facts, we cannot determine that AT&T's conduct in failing to strictly enforce the terms of the ICA with respect to billing is so unequivocal or decisive that it can be decided that AT&T, contrary to the ICA's non-waiver language, clearly demonstrated the intent to permanently waive those provisions.

We are aware of the legal concept of "equitable estoppel," which is so similar to the legal concept of waiver that it should be discussed, despite not being raised by either of the parties' pleadings. As we stated in Order No. PSC-01-2515-FOF-EI, issued December 24, 2001, in Docket No. 950379-EI, Re: Tampa Electric Company:

In order to demonstrate equitable estoppel, the following elements must be shown:  
1) a representation as to a material fact that is contrary to a position asserted later;

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2) reliance on that representation; and 3) a detrimental change in position to the party claiming estoppel caused by reliance on the representation. State Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). *See also* United Contractors Inc. v. United Construction Corp., 187 So. 2d 695 (Fla. 2d DCA 1966). Estoppel operates to prevent the benefitting party from repudiating the accompanying or resulting obligation. Doyle v. Tutan, 110 So. 2d 42, 47 (Fla. 3d DCA 1959).

We find that LifeConnex has not demonstrated that AT&T either made a representation as to a material fact contrary to a later position, nor that LifeConnex changed its position to its detriment. In fact, if anything, LifeConnex has been consistent in its conduct of not promptly paying its bills as required by the ICA, and rather acted contrary to those terms, and benefited from its conduct, to the extent that there is now over \$1.4 Million in dispute in Florida. We therefore decide that LifeConnex's arguments regarding waiver fail.

#### Grant of Relief With Conditions

We are troubled by AT&T's insistence on strictly enforcing the terms of the ICA at this point in time. We find the facts developed to date indicate that AT&T has allowed LifeConnex to continue service for several years, despite the fact that LifeConnex did not follow the terms of Sections 1.4 and 1.4.1 of Attachment 7 to the ICA, and that this failure has directly contributed to the accrual of approximately \$1.4 Million in disputed payments over the previous years. As a condition of providing future service, AT&T is attempting to insist on payment of the entire amount in dispute (the underlying amounts in this docket, which AT&T agreed in the Joint Motion to hold in Abeyance) in order to continue to provide ongoing service. AT&T's position in agreeing to hold determination of the disputed amount in abeyance, and then insisting on payment of a balance that took several years to accrue be paid within 30 days, is not fair, just, or reasonable, and we therefore grant LifeConnex's requested relief, with specific conditions, as follows.

We find that the \$1.4 Million in dispute, as discussed above, is fundamentally retroactive in character, and the proceeding currently held in Abeyance is the most efficient means of resolving that dispute. We also find that AT&T has the right to protect itself on a going-forward basis, pending the resolution of the dispute. To this end, we grant AT&T the right to insist on strict compliance with the payment terms of the ICA from July 13, 2010, onwards. To be clear: from the date of this decision, July 13, 2010, the terms of the Interconnection Agreement regarding billing and payment shall be followed, such that, upon receiving a bill from AT&T for service, LifeConnex shall pay such bill, including disputed amounts, within the time period prescribed in the ICA. If LifeConnex fails to comply with the terms of the ICA, including billing provisions, AT&T may take action as authorized by the ICA, including suspension, disconnection, and/or termination of service to LifeConnex.

Given the magnitude of the sum in dispute (approximately \$1.4 Million), we are concerned with ensuring that once this docket is resumed, and we make a final determination of the correct disposition of the amount currently in dispute, sufficient funds will be available for LifeConnex to pay AT&T such sums as we may determine are due and owing to AT&T.

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Therefore, as a further condition of allowing LifeConnex to continue to receive service from AT&T under the ICA during the pendency of this dispute, we order LifeConnex Telecom, LLC to post a bond in the amount of \$1.4 Million by July 21, 2010. The bond will remain in place throughout the remainder of this proceeding until we make final resolution of AT&T's Complaint and LifeConnex's claims and counterclaims and final disposition of all disputed matters, including funds in dispute, and the bond shall state that it will be released or shall terminate only upon subsequent order of this Commission.

Further, in order to protect LifeConnex's end user customers, we order that in the event AT&T initiates action to suspend, discontinue, or terminate LifeConnex's service, LifeConnex shall be required to provide notice to its end use customers, within 14 days of the receipt of written notice by AT&T that AT&T is initiating suspension, discontinuance and/or termination of LifeConnex's service, that the customer's service may be cut off and that the customer may wish to immediately begin seeking alternative telecommunications services in order to avoid lapse of service. Further, LifeConnex shall provide a copy of this notice to our staff for prior approval, and shall keep us fully advised of the status of its end use customers until AT&T's actions are resolved.

We wish to make clear that in granting LifeConnex relief with the above conditions, we are not granting equitable relief, nor are we granting an injunction. Instead, we are taking this action under our authority to issue an interim procedural order under our clear jurisdiction to enforce the terms of the ICA and to resolve matters in dispute. AT&T filed a complaint seeking our resolution of a dispute, after allowing an unpaid balance to accumulate over an extended period of time.<sup>4</sup> With both parties having affirmatively invoked our jurisdiction under both Federal and State law to interpret and enforce the ICA, and to adjudicate this dispute in particular, we determine to take interim action to protect both parties and LifeConnex Telecom, LLC's end user customers while this dispute is pending before us.

Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that LifeConnex Telecom, LLC's Request for Emergency Relief is GRANTED with conditions. It is further

ORDERED that AT&T and LifeConnex Telecom, LLC shall fully comply with all terms of the parties' Interconnection Agreement, including billing provisions, from July 13, 2010, onward. It is further

ORDERED that if LifeConnex Telecom, LLC fails to comply with the terms of the Interconnection Agreement, including billing provisions, AT&T may take such actions as are authorized by the parties' Interconnection Agreement, including suspension, discontinuance, and/or termination of service to LifeConnex Telecom, LLC. It is further

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<sup>4</sup> We note that AT&T could have sought to suspend, discontinue, and/or terminate LifeConnex at anytime during the extended period of non-payment of disputed amounts. Rather, AT&T chose to continue providing service and seek our resolution of this dispute. Now that the dispute is pending before us, AT&T shall not be allowed to subvert the judicial process by taking such sudden and detrimental action.

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ORDERED that amounts currently in dispute shall be resolved through the hearing process. It is further

ORDERED that LifeConnex Telecom, LLC shall, by July 21, 2010, post a bond in the amount of 1.4 Million Dollars, containing wording that the bond will be released or shall terminate only upon subsequent order of this Commission. It is further

ORDERED that in the event AT&T takes action to suspend, discontinue, and/or terminate service to LifeConnex Telecom, LLC, within fourteen (14) days of receipt of written notice that AT&T is taking such action, LifeConnex Telecom, LLC shall provide Notice to its customers informing them of the possibility their service may be interrupted and of their option to find alternative telecommunications services. It is further

ORDERED that LifeConnex Telecom, LLC, shall provide this Notice to Commission staff for review and prior approval in sufficient time as will allow LifeConnex Telecom, LLC to meet the fourteen (14) day notice requirement above. It is further

ORDERED that this docket shall remain open pending the resolution of AT&T's underlying Complaint and Petition for Relief and LifeConnex Telecom, LLC's claims and counter-claims.

By ORDER of the Florida Public Service Commission this 16th day of July, 2010.



ANN COLE  
Commission Clerk

(SEAL)

AJT

DISSENT BY: CHAIRMAN ARGENZIANO

CHAIRMAN ARGENZIANO dissents without separate opinion.

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**NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW**

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.



## **Exhibit D**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of BellSouth	)	Docket No. 100021-TP
Telecommunications, Inc. d/b/a AT&T	)	
Florida Against LifeConnex Telecom, LLC	)	
f/k/a Swiftel, LLC	)	Filed: September 13, 2010
_____	)	

**AT&T FLORIDA'S NOTICE OF FILING**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") hereby files the attached correspondence to LifeConnex Telecom, LLC f/k/a Swiftel, LLC and American Dial Tone, Inc.

Respectfully submitted this 13th day of September, 2010.

  
\_\_\_\_\_  
E. Earl Edenfield, Jr.  
Tracy W. Hatch  
Manuel A. Gurdian  
AT&T Florida  
c/o Gregory R. Follensbee  
150 South Monroe Street  
Suite 400  
Tallahassee, FL 32301  
Tel. No. (305) 347-5558  
Fax. No. (305) 577-4491  
[ke2722@att.com](mailto:ke2722@att.com)  
[th9467@att.com](mailto:th9467@att.com)  
[mg2708@att.com](mailto:mg2708@att.com)

**ATTORNEYS FOR BELL SOUTH  
TELECOMMUNICATIONS, INC., d/b/a  
AT&T FLORIDA**

FILED IN MAP-DATE  
17654 SEP 13 2010  
FPS-COMMISSION CLERK

AT&T Wholesale  
Four AT&T Plaza  
9<sup>th</sup> Floor  
311 S. Akard  
Dallas, TX 75202



September 13, 2010

VIA UPS, Tracking Number 1Z4AF1020191291578  
Stephen D. Klein  
American Dial Tone, Inc. f/k/a Ganoco, Inc.  
2323 Curlew Road  
Suite 7C  
Dunedin, FL 34698

VIA UPS, Tracking Number 1Z4AF1020184520387  
Thomas Biddix  
Director  
American Dial Tone, Inc. f/k/a Ganoco, Inc.  
6905 N. Wickham Road  
Suite 403  
Melbourne, FL 32940

VIA UPS, Tracking Number 1Z4AF1020190625996  
Edward Heard  
General Manager  
LifeConnex Telecom, LLC  
13700 Perdido Key Drive, Suite 222  
Perdido Key, FL 32507

VIA UPS, Tracking Number 1Z4AF1020191912405  
Thomas Biddix  
Manager  
LifeConnex Telecom, LLC  
6905 N. Wickham Road  
Suite 403  
Melbourne, FL 32940

**RE: SUSPENSION AND DISCONNECTION NOTICE TO AMERICAN DIAL TONE, INC.**

Dear Sirs:

AT&T Florida hereby provides notice that it will suspend order processing for American Dial Tone, Inc. f/k/a Ganoco, Inc. ("American Dial Tone") on September 29, 2010 and disconnect American Dial Tone's services on October 14, 2010.

In a flagrant attempt to help its affiliate, LifeConnex Telecom, LLC ("LifeConnex"), evade compliance with an order entered by the Florida Public Service Commission (the "Commission"), American Dial Tone is improperly cross-class selling residential services in violation of its interconnection agreement with AT&T Florida. Collectively, the actions of American Dial Tone and LifeConnex violate state law, federal law, and AT&T Florida's General Subscriber Services Tariff ("Tariff") as incorporated into the parties' interconnection agreements. AT&T Florida therefore has the right to refuse service to American Dial Tone.

- *The arrangement is a blatant attempt to circumvent lawful directives of the Florida Public Service Commission.*

As you know, LifeConnex owes AT&T Florida a substantial past-due and unpaid balance for telecommunications services AT&T Florida provided it for resale under the applicable interconnection agreement. As a result of this past-due and unpaid balance, in June 2010, AT&T Florida notified LifeConnex that if all unpaid balances were not paid, LifeConnex would be disconnected. In response, LifeConnex filed a Request for Emergency Relief asking that the Commission prohibit AT&T Florida from suspending, discontinuing or terminating LifeConnex's service in Florida.

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The Commission entered an Order requiring LifeConnex to post a \$1.4 million bond and to comply with the terms of the parties' interconnection agreement by paying all amounts billed by AT&T Florida (whether disputed or not) on a going-forward basis. LifeConnex failed to comply with the Commission's Order and was subsequently disconnected by AT&T Florida on August 9, 2010.

Prior to disconnection and pursuant to the Commission's order, LifeConnex advised its customers, via letter dated July 26, that their local telephone service would not be available after August 6, 2010 due to "a billing dispute between LifeConnex and its wholesale supplier." The very next day, however, LifeConnex advised its customers, via a different letter, that it was "able to resolve the situation", nothing would change on their account and the subscriber was required to take "NO ACTION".

After investigating the matter, AT&T Florida has learned that LifeConnex's "wholesale supplier" is American Dial Tone, but that American Dial Tone is classifying this service as residential service when it places its orders with AT&T Florida. American Dial Tone, therefore, is ordering residential service for resale pursuant to its interconnection agreement with AT&T Florida. Instead of reselling that residential service to residential end users, however, American Dial Tone is improperly offering that residential service to an affiliated business entity that does not even purport to be the end user of the service.<sup>1</sup>

• *The FCC and the Florida Commission have authorized restrictions on cross-class selling.*

In its *Local Competition Order*, the Federal Communications Commission ("FCC") held that pursuant to Section 251(c)(4) of the federal Act, state commissions have the authority to prevent resellers from reselling wholesale-priced residential services to business customers. See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15498, First Report and Order (August 8, 1996) at Paragraph 962 ("We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from reselling wholesale-priced residential services to business customers."). See also 47 C.F.R. §51.613(a)(1) ("A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.").

Consistent with these FCC decisions, the Florida Commission has ordered that a cross-class selling prohibition is valid. In re: *Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corp., MCI Metro Access Transmission Services, Inc., American Communications Services, Inc. and American Communications Services of Jacksonville, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996*, Docket Nos. 960833-TP, 960846-TP, 960816-TP, Order No. PSC-96-1579-FOF-TP (issued December 31, 1996) at 60 the Commission ruled:

Upon consideration, we believe that certain cross-class selling restrictions are appropriate. In particular, we find appropriate restrictions that would limit resale of...residential services... to end users who are eligible to purchase such service directly from BellSouth. Thus, based on the evidence and arguments presented, we find that no restrictions on the resale of services shall be

<sup>1</sup> If American Dial Tone is not LifeConnex's "wholesale supplier", AT&T Florida is concerned that LifeConnex and American Dial Tone may have conspired to "steal" LifeConnex's customers and secretly transfer those customers to American Dial Tone without authorization in direct violation of Florida Commission Rule 25-4.116 and Section 6.2 of Attachment 1 (Resale) of the parties' interconnection agreement through which American Dial Tone certified that it will have end user authorization before placing an order with AT&T Florida.

September 13, 2010  
Page 3

allowed, except for restrictions applicable to the resale of...residential services... to end users who are eligible to purchase such service directly from BellSouth.<sup>2</sup>

- *American Dial Tone's interconnection agreement with AT&T Florida contains valid cross-class selling restrictions.*

The Commission-approved interconnection agreement between AT&T Florida and American Dial Tone provides that AT&T Florida will make telecommunications services available to American Dial Tone for resale "subject to effective and applicable FCC and Commission rules and orders . . . ." See ICA, Attachment 1 (Resale), §3.1, and it specifically states that the "resale of telecommunications services shall be limited to users and uses conforming to the class of service restrictions." See ICA, Attachment 1 (Resale), § 4.1.1 (emphasis added). American Dial Tone, therefore, cannot "purchase at wholesale rates for resale, telecommunications services that [AT&T Florida] makes available only to residential customers" and then "offer such services to classes of customers that are not eligible to subscribe to such services from [AT&T Florida]." See 47 C.F.R. §51.613(a)(1). Because a business entity like LifeConnex is not eligible to subscribe to residential services from AT&T Florida, American Dial Tone cannot purchase residential services from AT&T at wholesale rates for resale and then offer those services to LifeConnex.

Additionally, the interconnection agreement provides that "[r]esold services can only be used in the same manner as specified in [AT&T Florida's] Tariffs" and that resold services "are subject to the same terms and conditions as are specified for such services when furnished to an individual End User of [AT&T Florida] in the appropriate section of [AT&T Florida's] Tariffs." See ICA, Attachment 1, § 4.2. AT&T Florida's Tariff, in turn, provides that "[t]elephone equipment, facilities, and service are furnished to the subscriber for use by the subscriber" and "[t]he subscriber's service may be shared with, but not resold to, the following individuals as authorized by the subscriber for that specific service..." See Tariff §A2.2.1A.<sup>3</sup> Moreover, "[i]n general, basic local exchange service as set forth in Section A2 of this Tariff is furnished for the exclusive use of the subscriber, employees, agents, representatives, or members of the subscriber's domestic establishment," and "[r]esale of local exchange service is permitted only under specific conditions as described in this Tariff." See Tariff §A23.1.1.A. Those "specific conditions" provide that "[r]esale is permitted where facilities permit and within the confines of specifically identified continuous property areas under the control of a single owner or management unit," *id.* §A23.1.2.B, a condition which clearly is not met when American Dial Tone purchases residential services from AT&T Florida for resale and then provides those services to a business entity like LifeConnex for end-users in various locations throughout AT&T Florida's service area.

Finally, the interconnection agreement provides that if American Dial Tone uses a resold telecommunications service "in a manner other than that for which the service was originally intended as described in [AT&T Florida's] retail tariffs, [American Dial Tone] has the responsibility to notify [AT&T Florida]." See ICA, Resale Attachment, §3.13. It further provides that if American Dial tone "desires to transfer any services hereunder to another provider of Telecommunications Service, or if [American Dial Tone] desires to assume hereunder any services provisioned by [AT&T Florida] to another provider of Telecommunications Service, such transfer of services shall be subject to separately negotiated rates, terms and conditions." See ICA, GTC, § 18.2. American Dial Tone failed to notify AT&T Florida that it was providing residential services it purchase from AT&T for resale to a business entity, and American Dial Tone and AT&T Florida have not "negotiated rates, terms and conditions" under which American Dial tone may transfer residential services AT&T Florida provides to American Dial Tone for resale to another service provider.

<sup>2</sup> See also *id.* at 57 ("The FCC's rules, 47 C.F.R. § 51.613, elaborate that restrictions may be imposed on cross-class selling and short term promotions.")

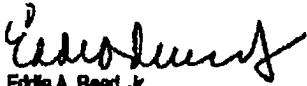
<sup>3</sup> Tariff § A2.2.1B provides that services specified in the Tariff may be resold; however, "except as otherwise noted by the Florida Public Service Commission", interconnection agreements and the Tariff. As indicated, all three prohibit American Dial Tone from cross-class selling to its affiliate, LifeConnex.

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Inasmuch as American Dial Tone and LifeConnex are violating state law, federal law, and AT&T Florida's Tariff as incorporated into the parties' interconnection agreement, AT&T Florida has the right to refuse service to American Dial Tone. See ICA, Attachment 1, § 3.9 ("Service is furnished subject to the condition that it will not be used for any unlawful purpose.") and ICA, Attachment 1, § 3.11 ("AT&T Florida can refuse service when it has grounds to believe that service will be used in violation of the law.").

Accordingly, based upon the foregoing, AT&T Florida hereby provides fifteen (15) day notice of suspension of services and thirty (30) day notice of disconnection of services.

Sincerely,



Eddie A. Reed, Jr.  
Director - Interconnection Agreements

cc: Matt Feil, Esq.  
Adam Teitzman, Florida Public Service Commission  
Beth Salak, Florida Public Service Commission  
Ann Cole, Florida Public Service Commission

## **Exhibit E**

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- 7.5 Recipient agrees not to publish or use the Information for any advertising, sales or marketing promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.
- 7.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, application or other intellectual property right that is now or may hereafter be owned by the Discloser.
- 7.7 Survival of Confidentiality Obligations. The Parties' rights and obligations under this Section 7 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.
- 8 **Resolution of Disputes**
- Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, shall petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.
- 9 **Taxes**
- 9.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not be limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefor, excluding any taxes levied on income.
- 9.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party
- 9.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.
- 9.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.



## **Exhibit F**

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**AGREEMENT  
GENERAL TERMS AND CONDITIONS**

**THIS AGREEMENT** is made by and between BellSouth Telecommunications, Inc., (BellSouth), a Georgia corporation, and AmeriMex Communications Corp. (AmeriMex), a Georgia corporation, and shall be effective on the Effective Date, as defined herein. This Agreement may refer to either BellSouth or AmeriMex or both as a "Party" or "Parties."

**W I T N E S S E T H**

**WHEREAS**, BellSouth is a local exchange telecommunications company authorized to provide Telecommunications Services (as defined below) in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee; and

**WHEREAS**, AmeriMex is or seeks to become a CLEC authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

**WHEREAS**, pursuant to Sections 251 and 252 of the Act; AmeriMex wishes to purchase certain services from BellSouth; and

**WHEREAS**, Parties wish to interconnect their facilities, exchange traffic, and perform Local Number Portability ("LNP") pursuant to Sections 251 and 252 of the Act as set forth herein; and

**NOW THEREFORE**, in consideration of the mutual agreements contained herein, BellSouth and AmeriMex agree as follows:

**Definitions**

**Affiliate** is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent.

**Commission** is defined as the appropriate regulatory agency in each state of BellSouth's nine-state region (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee).

**Competitive Local Exchange Carrier (CLEC)** means a telephone company certificated by the Commission to provide local exchange service within BellSouth's franchised area.

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shall not continue on a month to month basis but shall be deemed terminated as of the expiration date hereof.

2.4 In addition to as otherwise set forth in this Agreement, BellSouth reserves the right to suspend access to ordering systems, refuse to process additional or pending applications for service, or terminate service in the event of prohibited, unlawful or improper use of BellSouth's facilities or service, abuse of BellSouth's facilities or any other material breach of this Agreement, and all monies owed on all outstanding invoices shall become due.

2.5 If, at any time during the term of this Agreement, BellSouth is unable to contact AmeriMex pursuant to the Notices provision hereof or any other contact information provided by AmeriMex under this Agreement, and there are no active services being provided under this Agreement, then BellSouth may, at its discretion, terminate this Agreement, without any liability whatsoever, upon sending of notification to AmeriMex pursuant to the Notices section hereof

3. **Nondiscriminatory Access**

When AmeriMex purchases Telecommunications Services from BellSouth pursuant to Attachment 1 of this Agreement for the purposes of resale to End Users, such services shall be equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to others, including its End Users. To the extent technically feasible, the quality of a Network Element, as well as the quality of the access to such Network Element provided by BellSouth to AmeriMex shall be at least equal to that which BellSouth provides to itself and shall be the same for all Telecommunications carriers requesting access to that Network Element. The quality of the interconnection between the network of BellSouth and the network of AmeriMex shall be at a level that is equal to that which BellSouth provides itself, a subsidiary, an Affiliate, or any other party. The interconnection facilities shall be designed to meet the same technical criteria and service standards that are used within BellSouth's network and shall extend to a consideration of service quality as perceived by BellSouth's End Users and service quality as perceived by AmeriMex.

4 **Court Ordered Requests for Call Detail Records and Other Subscriber Information**

4.1 Subpoenas Directed to BellSouth. Where BellSouth provides resold services for AmeriMex, or, if applicable under this Agreement, switching, BellSouth shall respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to AmeriMex End Users. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request. BellSouth shall maintain such information for AmeriMex End Users for the same length of time it maintains such information for its own End Users.

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- 4.2 Subpoenas Directed to AmeriMex. Where BellSouth is providing resold services to AmeriMex, or, if applicable under this Agreement, switching, then AmeriMex agrees that in those cases where AmeriMex receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to AmeriMex End Users, and where AmeriMex does not have the requested information, AmeriMex will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth for handling in accordance with 4.1 above.
- 4.3 In all other instances, where either Party receives a request for information involving the other Party's End User, the Party receiving the request will advise the law enforcement agency initiating the request to redirect such request to the other Party.
- 5 **Liability and Indemnification**
- 5.1 AmeriMex Liability. In the event that AmeriMex consists of two (2) or more separate entities as set forth in this Agreement and/or any Amendments hereto, or any third party places orders under this Agreement using AmeriMex's company codes or identifiers, all such entities shall be jointly and severally liable for the obligations of AmeriMex under this Agreement.
- 5.2 Liability for Acts or Omissions of Third Parties. Neither Party shall be liable to the other Party for any act or omission of another entity providing any services to the other Party.
- 5.3 Limitation of Liability. Except for any indemnification obligations of the Parties hereunder, each Party's liability to the other for any loss, cost, claim, injury, liability or expense, including reasonable attorneys' fees relating to or arising out of any cause whatsoever, whether based in contract, negligence or other tort, strict liability or otherwise, relating to the performance of this Agreement, shall not exceed a credit for the actual cost of the services or functions not performed or improperly performed. Any amounts paid to AmeriMex pursuant to Attachment 9 hereof shall be credited against any damages otherwise payable to AmeriMex pursuant to this Agreement.
- 5.3.1 Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its End Users and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to the End User or third party for (i) any loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such loss and (ii) consequential damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a loss as a result thereof, such Party shall, except to the extent caused by the other Party's gross negligence or willful misconduct, indemnify and reimburse the other Party for that portion of the loss that would have been limited had the first

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the Discloser within forty-five (45) days thereafter, and shall be clearly marked with a confidential or proprietary legend.

- 7.2 Use and Protection of Information. Recipient agrees to protect such Information of the Discloser provided to Recipient from whatever source from distribution, disclosure or dissemination to anyone except employees of Recipient with a need to know such Information solely in conjunction with Recipient's analysis of the Information and for no other purpose except as authorized herein or as otherwise authorized in writing by the Discloser. Recipient will not make any copies of the Information inspected by it.
- 7.3 Exceptions. Recipient will not have an obligation to protect any portion of the Information which:
- 7.3.1 (a) is made publicly available by the Discloser or lawfully by a nonparty to this Agreement; (b) is lawfully obtained by Recipient from any source other than Discloser; (c) is previously known to Recipient without an obligation to keep it confidential; or (d) is released from the terms of this Agreement by Discloser upon written notice to Recipient.
- 7.4 Recipient agrees to use the Information solely for the purposes of negotiations pursuant to 47 U.S.C. 251 or in performing its obligations under this Agreement and for no other entity or purpose, except as may be otherwise agreed to in writing by the Parties. Nothing herein shall prohibit Recipient from providing information requested by the FCC or a state regulatory agency with jurisdiction over this matter, or to support a request for arbitration or an allegation of failure to negotiate in good faith.
- 7.5 Recipient agrees not to publish or use the Information for any advertising, sales or marketing promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.
- 7.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, application or other intellectual property right that is now or may hereafter be owned by the Discloser.
- 7.7 Survival of Confidentiality Obligations. The Parties' rights and obligations under this Section 7 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.
- 8 **Resolution of Disputes**
- Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper

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implementation of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, shall petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

9 **Taxes**

- 9.1 **Definition.** For purposes of this Section, the terms "taxes" and "fees" shall include but not be limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding (a) any taxes levied on either Party's corporate existence, status or income, (b) any corporate franchise taxes or (c) tax on property.
- 9.2 **Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.** Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.
- 9.2.1 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.
- 9.3 **Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.** Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.
- 9.3.1 To the extent permitted by applicable law, any such taxes and/or fees shall be shown on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed. If the providing Party fails to bill or to collect any taxes or fees herein, then as between the providing Party and purchasing Party, the providing Party shall be liable for any penalty assessed with respect to such uncollected taxes or fees by such authority.
- 9.3.2 If the purchasing Party determines that in its opinion any such taxes or fees are not payable, the providing Party shall not bill such taxes or fees to the purchasing Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be payable, or any such tax or

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the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

**17 Governing Law**

Where applicable, this Agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC and appropriate Commission. In all other respects, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles.

**18 Assignments and Transfers**

**18.1** Any assignment by either Party to any entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. Such consent shall not be unreasonably withheld, delayed or conditioned. If the assignee is an assignee of AmeriMex, the assignee must provide evidence of a Commission approved certification to provide Telecommunications Service in each state that AmeriMex is entitled to provide Telecommunications Service. After BellSouth's consent, the Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations. Notwithstanding anything to the contrary in this Section, AmeriMex shall not be permitted to assign this Agreement in whole or in part to any entity unless either (1) AmeriMex pays all bills, past due and current, under this Agreement, or (2) AmeriMex's assignee expressly assumes liability for payment of such bills.

**18.2** In the event that AmeriMex desires to transfer any services hereunder to another provider of Telecommunications Service, or AmeriMex desires to assume hereunder any services provisioned by BellSouth to another provider of Telecommunications Service, such transfer of services shall be subject to separately negotiated rates, terms and conditions.

**19 Notices**

**19.1** With the exception of billing notices, governed by Attachment 7, every notice, consent or approval of a legal nature, required or permitted by this Agreement shall be in writing and shall be delivered either by hand, by overnight courier or by US mail postage prepaid, or email if an email address is listed below, addressed to:

Attachment 1  
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**Attachment 1**

**Resale**



**3. General Provisions**

- 3.1** All of the negotiated rates, terms and conditions set forth in this Attachment pertain to the resale of BellSouth's retail telecommunications services and other services specified in this Attachment. Subject to effective and applicable FCC and Commission rules and orders, BellSouth shall make available to AmeriMex for resale those telecommunications services BellSouth makes available, pursuant to its General Subscriber Services Tariff and Private Line Services Tariff, to customers who are not telecommunications carriers.
- 3.1.1** When AmeriMex provides Resale service in a cross boundary area (areas that are part of the local serving area of another state's exchange) the rates, regulations and discounts for the tariffing state will apply. Billing will be from the serving state.
- 3.1.2** In Tennessee, if AmeriMex does not resell Lifeline service to any End Users, and if AmeriMex agrees to order an appropriate Operator Services/Directory Assistance block as set forth in BellSouth's General Subscriber Services Tariff, the discount shall be 21.56%.
- 3.1.2.1** In the event AmeriMex resells Lifeline service to any End User in Tennessee, BellSouth will begin applying the 16% discount rate to all services. Upon AmeriMex and BellSouth's implementation of a billing arrangement whereby a separate Master Account (Q-account) associated with a separate Operating Customer Number (OCN) is established for billing of Lifeline service End Users, the discount shall be applied as set forth in 3.1.2 preceding for the non-Lifeline affected Master Account (Q-account).
- 3.1.2.2** AmeriMex must provide written notification to BellSouth within 30 days prior to either providing its own operator services/ directory services or orders the appropriate operator services/directory assistance blocking, to qualify for the higher discount rate of 21.56%.
- 3.2** AmeriMex may purchase resale services from BellSouth for its own use in operating its business. The resale discount will apply to those services under the following conditions:
- 3.2.1** AmeriMex must resell services to other End Users.
- 3.2.2** AmeriMex cannot be a competitive local exchange telecommunications company for the single purpose of selling to itself.
- 3.3** AmeriMex will be the customer of record for all services purchased from BellSouth. Except as specified herein, BellSouth will take orders from, bill and receive payment from AmeriMex for said services.

Attachment 1

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(Automatic Location Identification/Location Information) databases used to support 911/E911 services.

- 3.22 BellSouth shall bill, and AmeriMex shall pay, the End User line charge associated with implementing Number Portability as set forth in BellSouth's FCC No. 1 tariff. This charge is not subject to the wholesale discount.
- 3.23 Pursuant to 47 CFR Section 51.617, BellSouth shall bill to AmeriMex, and AmeriMex shall pay, the End User common line charges identical to the End User common line charges BellSouth bills its End Users.
- 4. **BellSouth's Provision of Services to AmeriMex**
  - 4.1 Resale of BellSouth services shall be as follows:
    - 4.1.1 The resale of telecommunications services shall be limited to users and uses conforming to the class of service restrictions.
    - 4.1.2 Hotel and Hospital PBX services are the only telecommunications services available for resale to Hotel/Motel and Hospital End Users, respectively. Similarly, Access Line Service for Customer Provided Coin Telephones is the only local service available for resale to Payphone Service Provider (PSP) customers. Shared Tenant Service customers can only be sold those local exchange access services available in BellSouth's A23 Shared Tenant Service Tariff in the states of Florida, Georgia, North Carolina and South Carolina, and in A27 in the states of Alabama, Kentucky, Louisiana, Mississippi and Tennessee.
    - 4.1.3 BellSouth reserves the right to periodically audit services purchased by AmeriMex to establish authenticity of use. Such audit shall not occur more than once in a calendar year. AmeriMex shall make any and all records and data available to BellSouth or BellSouth's auditors on a reasonable basis. BellSouth shall bear the cost of said audit. Any information provided by AmeriMex for purposes of such audit shall be deemed Confidential Information pursuant to the General Terms and Conditions of this Agreement.
  - 4.2 Subject to Exhibit A hereto, resold services can only be used in the same manner as specified in BellSouth's Tariffs. Resold services are subject to the same terms and conditions as are specified for such services when furnished to an individual End User of BellSouth in the appropriate section of BellSouth's Tariffs. Specific tariff features (e.g. a usage allowance per month) shall not be aggregated across multiple resold services.
  - 4.3 AmeriMex may resell services only within the specific service area as defined in its certificate of operation approved by the Commission.

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  - 4.3 AmeriMex may resell services only within the specific service area as defined in its certificate of operation approved by the Commission.

Attachment 1

Page 6

- 3.8 BellSouth will allow AmeriMex to designate up to 100 intermediate telephone numbers per CLLIC, for AmeriMex's sole use. Assignment, reservation and use of telephone numbers shall be governed by applicable FCC rules and regulations. AmeriMex acknowledges that there may be instances where there is a shortage of telephone numbers in a particular CLLIC and BellSouth has the right to limit access to blocks of intermediate telephone numbers. These instances include: 1) where jeopardy status has been declared by the North American Numbering Plan (NANP) for a particular Numbering Plan Area (NPA); or 2) where a rate center has less than six months supply of numbering resources.
- 3.9 Service is furnished subject to the condition that it will not be used for any unlawful purpose.
- 3.10 Service will be discontinued if any law enforcement agency advises that the service being used is in violation of the law.
- 3.11 BellSouth can refuse service when it has grounds to believe that service will be used in violation of the law.
- 3.12 BellSouth will cooperate with law enforcement agencies with subpoenas and court orders relating to AmeriMex's End Users, pursuant to Section 6 of the General Terms and Conditions.
- 3.13 If AmeriMex or its End Users utilize a BellSouth resold telecommunications service in a manner other than that for which the service was originally intended as described in BellSouth's retail tariffs, AmeriMex has the responsibility to notify BellSouth. BellSouth will only provision and maintain said service consistent with the terms and conditions of the tariff describing said service.
- 3.14 Facilities and/or equipment utilized by BellSouth to provide service to AmeriMex remain the property of BellSouth.
- 3.15 White page directory listings for AmeriMex End Users will be provided in accordance with Section 8 below.
- 3.16 Service Ordering and Operations Support Systems (OSS)
- 3.16.1 AmeriMex must order services through resale interfaces, i.e., the Local Carrier Service Center (LCSC) and/or appropriate Complex Resale Support Group (CRSG) pursuant to this Agreement. BellSouth has developed and made available the interactive interfaces by which AmeriMex may submit a Local Service Request (LSR) electronically as set forth in Attachment 6 of this Agreement. Service orders will be in a standard format designated by BellSouth.
- 3.16.2 LSRs submitted by means of one of these interactive interfaces will incur an OSS electronic charge as set forth in Exhibit D of this Attachment. An individual LSR

Attachment 1

Page 6

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**Attachment 7**  
**Page 1**

**Attachment 7**

**Billing**

Version: 4Q04 Standard ICA  
03/17/05

- 1.5.1 In order of severity, Suspend/Suspension, Discontinue/Discontinuance and Terminate/Termination are defined as follows for the purposes of this Attachment:
- 1.5.1.1 Suspend/Suspension is the temporary restriction of the billed Party's access to the ordering systems and/or access to the billed Party's ability to initiate PIC-related changes. In addition, during Suspension, pending orders may not be completed and orders for new service or changes to existing services may not be accepted.
- 1.5.1.2 Discontinue/Discontinuance is the denial of service by the billing Party to the billed Party that will result in the disruption and discontinuation of service to the billed Party's End Users or customers. Additionally, at the time of Discontinuance, BellSouth will remove any Local Service Freezes in place on the billed Party's End Users.
- 1.5.1.3 Terminate/Termination is the disconnection of service by the billing Party to the billed Party.
- 1.5.2 BellSouth reserves the right to Suspend, Discontinue or Terminate service in the event of prohibited, unlawful or improper use of BellSouth facilities or service, abuse of BellSouth facilities, or any other violation or noncompliance by AmeriMex of the rules and regulations of BellSouth's tariffs.
- 1.5.3 Suspension. If payment of undisputed amounts due as described herein is not received by the bill date in the month after the original bill date, i.e., the same date in the following month as the bill date, or as required in Section 1.3 in the case of security deposits, BellSouth will provide written notice to AmeriMex that services will be Suspended if payment of such undisputed amounts, and all other undisputed amounts that become past due before Suspension, is not received by wire transfer, automatic clearing house or cashier's check in the manner set forth in Section 1.4.1 above, or in the case of a security deposit request, in the manner set forth in Section 1.3.1: (1) within seven (7) days following such notice for CABS billed services; (2) within fifteen (15) days following such notice for CRIS and IBS billed services; and (3) within seven (7) days following such notice for security deposit requests in accordance with Notices Section of the General Terms and Conditions.
- 1.5.3.1 The Suspension notice shall also provide that all past due undisputed charges for CRIS and IBS billed services, and all other amounts that become past due for such services before Discontinuance, must be paid within thirty (30) days from the date of the Suspension notice to avoid Discontinuance of CRIS and IBS billed services.
- 1.5.3.2 For CABS billed services, BellSouth will provide a Discontinuance notice that is separate from the Suspension notice, that all past due undisputed charges for CABS billed Services, and all other undisputed amounts that become past due for such services before Discontinuance, must be paid within thirty (30) days from the date of the Suspension notice to avoid Discontinuance of CABS billed services.

## **Exhibit G**



OFFICIAL APPROVED VERSION, RELEASED BY BSTHQ

BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA

GENERAL SUBSCRIBER SERVICE TARIFF

Second Revised Page 1  
Cancels First Revised Page 1

ISSUED: July 27, 1998  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

EFFECTIVE: August 11, 1998

## A2. GENERAL REGULATIONS

### A2.1 Application

- A. The regulations specified herein are applicable to all communication services offered in this Tariff by BellSouth Telecommunications, Inc., hereinafter referred to as the Company. Additional regulations, where applicable, pertaining to specific service offerings accompany such offerings in various sections of this Tariff.
- B. Service to Century, Florida is provided by BellSouth Telecommunications, Inc. from the Flomaton, Alabama, exchange. Rules, regulations and rates applicable at Century are as specified in the this Tariff.

### A2.2 Limitations and Use of Service

#### A2.2.1 Use of Subscriber's Service

##### A. Restricted to Authorized Users

Telephone equipment, facilities, and services are furnished to the subscriber for use by the subscriber.

1. The subscriber's service may be shared with, but not resold to, the following individuals as authorized by the subscriber for that specific service:
  - a. Members of the subscriber's domestic establishment;
  - b. Employees, agents, or representatives of the subscriber;
  - c. Members of clubs at the specified club locations;
  - d. Patients of hospitals at those establishments;
  - e. Occupants of licensed Nursing Homes, licensed Adult Congregate Living Facilities, or licensed continuing care facilities or facilities certified in accordance with the National Housing Act at those establishments;
  - f. Students living in quarters furnished by the school, college, or university which subscribes to the service;
  - g. Persons temporarily subleasing the subscriber's residential premises;
  - h. Transient public in connection with the use of reservation service at airport terminals for use by the general public;
  - i. Exhibitors in exhibition halls authorized to use the subscriber's service on a temporary basis, not to exceed 30 days, at those locations;
  - j. Businesses located at the airport terminal and engaged in airport operations for the subscribing airport's local service extended for the proper functioning of the airport.

##### B. Resale of Service

*Unless otherwise specified, service furnished by the Company is intended only for communications in which the subscriber has a direct interest. However, most services specified in this Tariff are available for resale, except as otherwise noted by the Florida Public Service Commission and in the Alternative Local Exchange Carriers' (ALECs) resale agreements, by the ALECs and subject to the terms and conditions specified in this Tariff.*

1. (DELETED)

OFFICIAL APPROVED VERSION, RELEASED BY BSTHQ

BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA

GENERAL SUBSCRIBER SERVICE TARIFF

First Revised Page 1  
Cancels Original Page 1

ISSUED: March 27, 1997  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

EFFECTIVE: April 11, 1997

**A23. INTERCONNECTION OF LOCAL EXCHANGE SERVICES TO SHARED  
TENANT SERVICES**

(T)

**A23.1 Provision of Service**

**A23.1.1 General**

- A. In general, basic local exchange service as set forth in Section A2 of this Tariff is furnished for the exclusive use of the subscriber, employees, agents, representatives, or members of the subscriber's domestic establishment. Resale of local exchange service is permitted only under specific conditions as described in this Tariff.
- B. For the purpose of this Tariff section "Shared Tenant Services" or STS is defined as the sharing or resale of a common group of local exchange service access lines through a common switching or billing arrangement to tenants.
- C. The rates specified herein are in addition to the rates shown elsewhere in this Tariff for services with which this offering is associated. (N)
- D. Basic local exchange service provided for resale may be flat or measured. (N)

**A23.1.2 Conditions for Service**

- A. Customers desiring to resell exchange services provided by the Company must apply to the Florida Public Service Commission for certification as an STS provider. Resale of local service will only be permitted if such certification is granted. Customers desiring to resell local service must submit all Company required documentations (i.e. Letter of Agreement, PSC Tracking Requirement, Request Notice, etc.) including proof of their approved certification before service will be established.
- B. Resale is permitted where facilities permit and within the confines of specifically identified continuous property areas under the control of a single owner or management unit. Areas designated for resale may be intersected or transversed by public thoroughfares provided that the adjacent property segments created by intersecting or transversing thoroughfares would be continuous in the absence of the thoroughfare. The designated resale service area must be wholly within the confines of existing wire centers and/or exchange boundaries.
- C. The provision of STS shall in no way interfere with a Reseller Client's right to direct service or the right of the Company to directly serve the tenant under the terms and conditions of this Tariff.
- D. In order to fulfill the Company's obligation to provide local exchange service to all customers within its franchised area, including those located within an STS building, the Company must be guaranteed access to the premises of all individual tenants. Resale of local service will only be permitted once such direct access including support facilities (e.g., conduit, equipment space, etc.) to any and all individual subscribers has been secured. To fulfill its obligation, the Company generally installs and maintains its own transmission facilities. However, at the Company's option, in lieu of Company owned facilities, the Company may choose to negotiate for the use of privately owned transmission facilities. Should the Company elect this option, such negotiation would provide reasonable compensation for the use of privately owned facilities.
- E. DELETED (D)
- F. Conditions and limitations restricting the resale or sharing of Foreign Exchange Service apply.
- G. All rates and charges in connection with the resale operation and all repairs and rearrangements behind and including the communication switch of the Reseller will be the responsibility of the Customer of Record. The Reseller will be the single point of contact for all Resale Client services provided in connection with the Sharing and Resale of Basic Local Exchange Service.

OFFICIAL APPROVED VERSION, RELEASED BY BSTHQ

BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA

ISSUED: March 3, 1997  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

GENERAL SUBSCRIBER SERVICE TARIFF

First Revised Page 4  
Cancels Original Page 4

EFFECTIVE: April 1, 1997

**A1. DEFINITION OF TERMS**

(T)

**CIRCUIT**

See "Exchange Access Line".

**CLASS OF SERVICE**

A description of telephone service furnished a subscriber in terms such as:

a. For Exchange Service:

- (1) Grade of Line: Individual Line
- (2) Type of Rate: Flat rate or message rate.
- (3) Character of Use: Business or residence.
- (4) Dialing Method: Touch-Tone or Rotary.

b. For Long Distance Telecommunications Service:

- (1) Type of Call: Station-to-Station or Person-to-Person.

c. For Wide Area Telecommunications Service:

- (1) Type of Service: Outward or 800 Service .

**(DELETED)**

(D)

**COIN REFUND AND REPAIR REFERRAL SERVICE**

Coin Refund and Repair Referral Service (CRS) provides handling of refund requests and repair referrals generated by the end users of Independent Payphone Provider (IPP) public telephones.

**COLLECT CALL**

The term "Collect Call" denotes a billing arrangement by which the charge for a call may be reversed provided the charge is accepted at the called station. A collect call may be billed to a Calling Card or third party number. In the case of a coin telephone the charges must be billed to a Calling Card or third party number, or the call may be reoriginated from the called station.

(C)

**COMMITMENT GUARANTEE**

A plan establishing a credit that will be issued to a customer in the event that the Company misses a commitment in connection with installation or repair of service provided over the Company's facilities, unless an exception is applicable.

**COMMON BATTERY SERVICE**

The type of telephone service in connection with which electrical energy for talking and signaling is supplied from a central point.

**COMMUNICATIONS SYSTEMS**

Channels and other facilities which are capable, when not connected to telecommunications services, of communications between terminal equipment.

The term "Communications Systems" when used in connection with communications systems provided by an Other Carrier (OC), denotes channels and other facilities furnished by the OC for private line services as such OC is authorized by the Federal Communications Commission or Public Service Commission to provide.

## **Exhibit H**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

AMERICAN DIAL TONE, INC., )

Plaintiff, )

vs. )

Case No. 8:10-CV-2194-T-27MAP

BELLSOUTH TELECOMMUNICATIONS, )  
INC. D/B/A AT&T FLORIDA, )

Defendant. )  
\_\_\_\_\_ )

**DECLARATION OF WILLIAM E. GREENLAW**

My name is William E. Greenlaw. I am over 21 years of age and am competent to make this affidavit. This affidavit is based upon my personal knowledge.

1. I am an employee of AT&T Operations, Inc., a company that, among other things, provides sales and marketing services for its affiliated companies, including BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T"). I am employed as Area Manager - Regulatory Relations and have worked for AT&T or an affiliated company for over 17 years. My business address is 311 South Akard Street, Dallas, Texas 75202.

2. As Area Manager - Regulatory Relations, my job responsibilities include testifying about interconnection agreement policies between AT&T and competitive local exchange carriers, such as American Dial Tone, Inc. ("ADT") and LifeConnex Telecom, LLC f/k/a Swiftel, LLC ("LifeConnex").

3. According to ADT's pleadings, ADT is placing orders with AT&T for residential local exchange service and then providing that residential service to LifeConnex, an affiliated business entity. LifeConnex then resells those residential services to LifeConnex's end users. In placing orders with AT&T, ADT apparently does not differentiate between service that it resells to ADT's own residential end user customers and service that ADT provides to LifeConnex for it, in turn, to provide to its end users.

4. The interconnection agreement between ADT and AT&T provides that under certain circumstances, ADT "may purchase resale services from BellSouth for its own use in operating its business." ICA, Resale (Attachment 1), § 3.2. I understand that ADT has argued that this provision "expressly permits ADT to 'purchase resale services from [AT&T] for its own use in operating its business'" and that the "business" of ADT includes the provisioning of

wholesale, residential service to its affiliate, LifeConnex. ADT Brief at 9. As an example of why this provision is included in the agreement, it would allow ADT to buy a business line at wholesale rates (instead of retail rates) for its employees to use to make business calls. This provision simply does not allow ADT to buy residential service at wholesale prices and provide that residential service to another CLEC (in this instance LifeConnex) for that CLEC to, in turn, sell to that CLEC's customers. By its terms, Section 3.2 only allows ADT to order telephone lines for "its business" not to order lines for another company's business.

5. ADT's public website provides that when a customer is ordering service for Florida, the actual service is being provided by a carrier called "Easy Telephone." See <http://www.americandialtone.com/ADTApps/LifelineCert.aspx?stateName=FL>. This page from ADT's public website is attached to my affidavit as Exhibit "1." A document accessible on the ADT website requires ADT customers to acknowledge that they "authorize Easy Telephone Services, Inc. to be my local and long distance carrier for the above listed number. I also understand that I will be billed for my telephone service by Easy Telephone Services, Inc." This document is attached to my affidavit as Exhibit "2."

6. If ADT is disconnected by AT&T, ADT's customers have many options for telephone service, including other CLEC and wireless providers. Furthermore, AT&T provides resale service to other prepaid telecommunications providers that operate in the State of Florida as well.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

  
William E. Greenlaw

Dated: October 19, 2010

## **Exhibit 1**

## Home Phone Service

- [Home Phone](#)
- [Payments](#)
- [Products & Services](#)
- [Customer Login](#)
- [Help](#)
- [Contacts](#)
- [Agent Login](#)

## Ordering Home Phone Service

There are 2 steps to activating your Home Phone Service  
Service provided by:



Step 1. [Order Service On-Line](#)

Step 2. Fill out and return the [Lifeline Self Certification Form](#)

(Required in order to get our best rate)

To get your Lifeline and Linkup assistance reduced rate, you must complete and return to us a self certification. It is very simple. Print the form, fill it out and fax, mail, or scan then email it to us. The fax number is printed on the form.

If you are currently receiving some form of Government assistance, you are qualified for Lifeline Home Phone Service. Lifeline Home Phone Service is government assisted home phone service and will reduce your monthly service by up to \$13.50.

You are also then qualified for Linkup assistance which will subsidize half of your connection costs up to \$30. Linkup is a one time benefit per household. If you've taken Linkup assistance from us or any other phone company in the past, you are no longer entitled to that \$30 subsidy.

[Residential Phone Service](#) | [Cheap Phone Service](#) | [Lifeline Home Phone Service](#)  
[Low Income & Government Assisted Phone Service](#) | [Lifeline Phone Service](#) | [Pay-as-you-go Prepaid Home Phone](#)  
[Long Distance Terms of Use](#) | [Privacy Policy](#)

Providing Home Phone Service for [Alabama](#), [Florida](#), [Kentucky](#), [Louisiana](#), [North Carolina](#), [Oklahoma](#), [South Carolina](#), [Tennessee](#) and [Texas](#)



American Dial Tone | P.O. Box 2203 - Dunedin, Florida 34697-2203 | Toll Free 866-203-0668

[info@americandialtone.com](mailto:info@americandialtone.com)

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## **Exhibit 2**



Easy Telephone Services, Inc.  
PO Box 831717  
Ocala, FL 34483

**Please fill out this form and send back immediately**

We must have this completed form signed by you in order for you to receive your home phone Lifeline discount!

### Lifeline and Link-Up Self-Certification Form

Required Fields are in Red

#### Customer Information (print clearly)

Date \_\_\_\_\_  
Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle Init. \_\_\_\_\_  
Address \_\_\_\_\_ Apt # \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_  
Last 4 Digits of SSN: \_\_\_\_\_  
Current Home Phone Number (\_\_\_\_) \_\_\_\_\_ (if applicable)  
Contact Phone Number (\_\_\_\_) \_\_\_\_\_ (required)

I authorize Easy Telephone Services, Inc. to be my local and long distance carrier for the above listed telephone number. I also understand that I will be billed for my telephone service by Easy Telephone Services, Inc.

☐ I certify that I have received the link-up discount at this residence from another carrier and I am not eligible for the discount at this time.

#### Eligibility Requirements

I hereby certify that I participate in the following public assistance program(s) (Check all that apply):

- |  |  |
|--|--|
| <input type="checkbox"/> Medicaid                                      | <input type="checkbox"/> Low Income Home Energy Assistance Plan (LIHEAP) |
| <input type="checkbox"/> Food Stamps                                   | <input type="checkbox"/> National School Free Lunch Program (FL Only)    |
| <input type="checkbox"/> Supplemental Security Income (SSI)            | <input type="checkbox"/> Below Federal Poverty Level (FL Only)           |
| <input type="checkbox"/> Federal Public Housing (HUD/Section 8)        | <input type="checkbox"/> Temporary Cash Assistance (TCA) (FL Only)       |
| <input type="checkbox"/> Temporary Assistance to Needy Families (TANF) |  |

#### Certification and Signature (Please read and sign)

I certify that I am a current recipient of the above programs(s) and will notify my local telephone company when I am no longer participating in any of the above-designated program(s). I give permission to the duly authorized official(s) administering the above programs to provide to the local telephone company my participation status in any of the above program(s). I give this permission on the condition that the information on this form and any information about my participation in the above programs provided by officials be maintained by the company as confidential customer account information. I am aware that pursuant to Section 837.06, F.S., whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his or her official duty shall be guilty of a misdemeanor of the second degree.

X \_\_\_\_\_

Applicant's Signature

\_\_\_\_\_ Date

Fax this completed and signed form to:

**1-877-512-0042**

Or, Mail to: **Easy Telephone Services, Inc.**

**PO Box 831717**

**Ocala, FL 34483**

## **Exhibit I**

**STATE OF FLORIDA**  
**PUBLIC SERVICE COMMISSION**

In Re: Complaint of BellSouth Telecom- )  
munications, Inc., d/b/a AT&T Florida )  
Against LifeConnex Telecom, LLC f/k/a )  
Swiftel, LLC )

Docket No. 100021-TP  
Filed: September 23, 2010

**LIFE CONNEX'S NOTICE OF FILING**

LifeConnex Telecom, LLC f/k/a Swiftel, LLC ("LifeConnex") hereby files the  
attached correspondence replying to AT&T Florida's September 13, 2010, Notice of  
Filing and letter to LifeConnex and American Dial Tone, Inc.

Respectfully submitted this 23<sup>rd</sup> day of September, 2010.



Matthew Feil, Esq.  
Akerman Senterfitt  
106 East College Avenue, Suite 1200  
Tallahassee, FL 32301  
(850) 425-1614

*Attorneys for LifeConnex Telecom, LLC*

{TL237972;1}

DOCUMENT NUMBER DATE

08004 SEP 23 2

FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 23rd day of September, 2010.

Charles Murphy, Esq. Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 cmurphy@psc.state.fl.us	E. Earl Edenfield, Jr. Tracy W. Hatch Manuel A. Guardian AT&T Florida c/o Gregory R. Follensbee 150 South Monroe Street Suite 400 Tallahassee, FL 32301 ke2722@att.com mg2708@att.com th9467@att.com
Henry M. Walker, Esq. Bradley Arant Boult Cummings, LLP 1600 Division Street Suite 700 Nashville, TN 37203 hwalker@babc.com	Chris Sutch Associated Telecom Management Svcs, LLC 6095 North Wickham Road Suite 403 Melbourne, FL 32940-7553 legal@telecomgroup.com

By:   
Matthew Feil, Esq.



Henry Walker  
Direct: 615.252.2363  
Fax: 615.252.6363  
henk@tabc.com

September 23, 2010

Mr. Eddie A. Reed, Jr.  
AT&T Wholesale  
Four AT&T Plaza, 9<sup>th</sup> Floor  
311 S. Akard  
Dallas, TX 75202

Re: Suspension and Disconnection Notice to American Dial Tone, Inc.

Dear Mr. Reed:

I am writing on behalf of American Dial Tone ("ADT") in response to your letter to ADT dated September 13, 2010, in which AT&T states its intention to discontinue processing new orders from ADT for wholesale service in Florida effective September 29, 2010 and to terminate AT&T's Florida contract with ADT on October 14, 2010.

Please be advised that AT&T is bound by the parties' interconnection agreement (the "Agreement") to provide wholesale service to ADT in Florida and that any interruption in service will result in substantial damages to ADT and its Florida customers. ADT will, if necessary, file suit to prevent this threatened interruption of service and to recover damages from AT&T.

ADT provides retail service to 18,577 residential customers in Florida and serves them by purchasing wholesale residential services from AT&T and reselling those services to residential end users. For a few months, ADT is also purchasing residential lines from AT&T which are used by Life Connex, an affiliate of ADT, to provide retail service to its own remaining residential customers in Florida. At this time, there are only about 1,000 of those customers left. Within a few months, nearly all of those will be gone too.<sup>1</sup>

Your letter states that AT&T believes that by allowing its affiliate, Life Connex, to use ADT's lines to serve residential customers, ADT is "improperly cross-class selling residential services" in violation of the Agreement between AT&T and ADT. Even if AT&T's position were the correct interpretation of the Agreement and law – which it clearly is not, as explained below – AT&T's threat to engage in "self-help" by suspending, then terminating, service to more than 18,000 ADT customers in Florida goes far beyond any appropriate recourse and unjustifiably threatens service to ADT's retail customers who have nothing to do with Life Connex.

<sup>1</sup> In July, 2010, Life Connex discontinued marketing in Florida and has added no new customers since that time. Through normal attrition, the number of remaining customers is dwindling rapidly and, after six months, should be fewer than 100. The temporary arrangement with ADT allows Life Connex to continue serving these customers during this period.

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FPC-CORRESPONDENCE

Mr. Eddie A. Reed, Jr.  
September 23, 2010  
Page 2

More importantly, ADT has not breached its interconnection agreement with AT&T. As explained below, all residential services purchased by ADT from AT&T are resold to residential end users.

Your allegation that ADT has breached the Agreement by reselling residential service to business customers relies principally on the language of Attachment 1, Section 4.1.1 of the Agreement which states, "The resale of telecommunications services shall be limited to users and uses conforming to the class of service restrictions." AT&T also relies on the Florida Commission rule which approves "restrictions that would limit resale of . . . residential services . . . to end users who are eligible to purchase such services directly from BellSouth." In other words, ADT may not purchase residential lines from AT&T and resell those lines to end users who are not residential customers. As the FCC said, "There is general agreement that residential services should not be resold to non-residential end users . . . For example, this would prevent resellers from reselling wholesale-priced residential service to business customers." FCC "First Report and Order," CC Docket 96-98 (August 8, 1996), paragraph 962.

In sum, AT&T claims that ADT is improperly reselling AT&T's residential service to Life Connex, a business customer. AT&T has apparently overlooked, or chosen to disregard, the definitions of "telecommunication service," "resale," and "end user" as those terms are used in the parties' interconnection agreement. "Telecommunications Service" is defined in the Agreement as the offering of telecommunications for a fee directly to the public." General Terms and Conditions, p. 2 (emphasis added). Similarly, "resale" is defined as "the activity wherein a certificated CLEC . . . subscribes to the telecommunications services of BellSouth and then offers those telecommunications services to the public." Attachment 1, Section 2.7 (emphasis added). Finally, the Agreement defines "end user" as "the ultimate user of the telecommunications service." General Terms and Conditions, p. 2 and Attachment 1, Section 2.4 (emphasis added).

In other words, the "resale" of "telecommunications service" means the sale of service "to the public." It does not mean the use of ADT's lines by Life Connex. Furthermore, Life Connex is not the "end user" of these services. The "end user", i.e., the "ultimate user" of every such line is a residential customer of Life Connex. Therefore, ADT is not engaged in the "resale" of "telecommunications services" to Life Connex, nor are those residential lines being resold to "end users" who are business customers. ADT is therefore not in violation of the Agreement or the federal and state prohibitions against the cross-class resale of residential service.

Your letters also implies that the Agreement states that ADT may only purchase wholesale services for resale directly to residential customers. That implication is incorrect. Contrary to your letter, the Agreement expressly permits ADT to "purchase resale services from BellSouth [AT&T] for its own use in operating its business." Attachment 1, Section 3.2. Here, the "business" of ADT includes, for a few months, the provision of wholesale, residential service



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to its affiliate, Life Connex. ADT is entitled to purchase resale service from AT&T for that purpose, "for [ADT's] own use in operating its business."<sup>2</sup>

Finally, please be advised that AT&T may not unilaterally terminate the Agreement solely because the parties disagree over its "interpretation" or "implementation." The Agreement requires that if AT&T disputes this "interpretation" or "implementation" of the Agreement, AT&T "shall petition the [Florida Public Service] Commission for a resolution of the dispute." General Terms and Conditions, Section 8 (emphasis added). AT&T has not petitioned the Commission for resolution of the dispute and may not by-pass that requirement of the Agreement with an unprecedented and disproportionate act of self-help.

In conclusion, AT&T has no right to terminate the Agreement with ADT because a small portion of the residential lines purchased at wholesale by ADT are being used by Life Connex to serve its own residential customers. ADT, not Life Connex, is responsible to AT&T for the cost of those lines under the Agreement and is paying the charges for those lines.<sup>3</sup> ADT is merely acting as the underlying provider for Life Connex so that the remaining customers of Life Connex may continue receiving service for the next few months. Even if the Agreement prohibited this arrangement (which it does not), AT&T cannot reasonably contend that ADT's temporary provision of wholesale service to Life Connex justifies termination of the Agreement. To warrant termination of a contract, the alleged breach must be "so substantial and fundamental as to defeat the object of the parties in making the agreement." General Steel, Inc. v. Delta Building Systems Inc., 676 S.E. 2d 451 (Georgia Court of Appeals, 2009); see Mayor of Douglasville v. Hildebrand, 333 S.E.2d 674 (Ga. Supreme Ct., 1985). The temporary use by Life Connex of 5% of ADT's lines to maintain service to residential customers is hardly a "substantial and fundamental" breach of the parties' intentions, or the purposes of the federal and state laws which govern the Agreement.

On the whole, your letter appears intended more as editorial comment about alleged issues between Life Connex and the Florida Commission than about the legal rights of ADT under its Agreement with AT&T. As you are aware, AT&T has an obligation under federal law to provide wholesale services to ADT pursuant to the parties' Agreement. If AT&T intends to proceed with termination of the Agreement, ADT will seek injunctive relief and monetary damages in a court of competent jurisdiction. To avoid unnecessary expense and litigation,

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<sup>2</sup> In your letter, you also cite Section 18 of the Agreement concerning "Assignments and Transfers" and claim that ADT cannot "transfer" service to another provider unless AT&T and the other provider agree to "separately negotiated rates, terms and conditions." General Terms and Conditions, Section 18.2. As you should know, the language in Section 18 refers to the transfer to another party of ADT's contractual rights under the parties' Interconnection Agreement. See U.C.C. §§3-201(1) and 7-504(1) and Black's Law Dictionary ("Transfer is the all encompassing term used by the Uniform Commercial Code to describe the act which passes an interest in an instrument to another.") That Section on Assignments and Transfers concerns ADT's rights under the parties' contract and has nothing to do with the circumstances here.

<sup>3</sup> Since no new customers are being added by Life Connex, ADT does not claim any promotional credits associated with the purchase of those lines from AT&T.

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please have your attorney contact me before AT&T takes any action to disrupt its service to ADT.

Very truly yours,

BRADLEY ARANT BOULT CUMMINGS LLP

By:

  
Henry Walker

HW/dnr

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**AMERICAN DIAL TONE, INC.,**

**Plaintiff,**

**vs.**

**Case No. 8:10-CV-2194-T-27MAP**

**BELLSOUTH TELECOMMUNICATIONS,  
INC., d/b/a AT&T FLORIDA,**

**Defendant.**

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**ORDER**

**BEFORE THE COURT** is Plaintiff's Emergency Motion for Temporary Restraining Order (Dkt. 2), which was construed at the parties' request (Dkt. 7) as a motion for preliminary injunction. Upon consideration, the motion is **DENIED**.

A district court may grant preliminary injunctive relief if the moving party shows that: (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000).

Plaintiff American Dial Tone, Inc. ("ADT") provides local telephone service to approximately 18,600 residential customers in Florida.<sup>1</sup> Plaintiff is a competitive local exchange

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<sup>1</sup> Compl., Dkt. 1 ¶ 5; Oct. 13, 2010 Affidavit of Thomas Biddix ("Biddix Aff." [Dkt. 8-1]) ¶ 2.



carrier ("CLEC") within the meaning of the Telecommunications Act of 1996 (the "TCA"), Pub. L. No. 104-404, 110 Stat. 56. ADT serves its customers by purchasing wholesale residential telephone services from Defendant Bellsouth Telecommunications, Inc., d/b/a AT&T Florida ("AT&T"). *See* Biddix Aff. ¶ 3. AT&T is an incumbent local exchange carrier ("ILEC") within the meaning of the TCA.

The TCA imposes various obligations on telecommunications carriers. When a CLEC seeks access to a market, an ILEC must "provide . . . interconnection with" the ILEC's existing network, 47 U.S.C. § 251(c)(2), and the carriers must negotiate in good faith the terms and conditions of an interconnection agreement, *id.* § 251(c)(1). If the carriers are able to reach an agreement, the relevant state public service commission ("PSC") must approve or reject the agreement. *See* 47 U.S.C. § 252(e). A requesting CLEC may also choose to adopt all of the terms and conditions of an existing PSC-approved interconnection agreement that the ILEC has with another CLEC. 47 U.S.C. § 252(i).

Pursuant to Section 252(i), in July, 2006, ADT adopted the interconnection agreement between AT&T and Amerimax Communications Corp. (the "ICA").<sup>2</sup> Section 8 of the General Terms & Conditions of the ICA provides:

Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved party, if it elects to pursue resolution for the dispute, shall petition the [Public Service] Commission for a resolution of the dispute. However, each party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

ADT is affiliated in a manner not specified with another CLEC, LifeConnex LLC, f/k/a

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<sup>2</sup> Sept. 30, 2010, 2010 Declaration of Thomas Biddix ("Biddix Decl." [Dkt. 3]) ¶ 3.

Swiftel LLC ("LifeConnex"). As a result of a billing dispute between LifeConnex and AT&T and a ruling by the Florida Public Service Commission (the "FPSC"), AT&T terminated service to LifeConnex in Florida in August, 2010. *See Biddix Aff.* ¶ 9; Dkt 8-1 at 7-8; *cf.* Dkt. 10-3.

In a September 13, 2010 "Suspension and Disconnection Notice" (Dkt. 8-1 at 7-10), AT&T stated that ADT had violated a provisions of the ICA prohibiting "cross-class selling" by offering residential telecommunications services purchased from AT&T at residential rates for resale to LifeConnex. AT&T announced its intent to (1) discontinue processing new ADT orders for wholesale telephone service in Florida effective September 29, 2010 and (2) terminate service to ADT on October 14, 2010 in accordance with provisions of the ICA authorizing termination of service in the event of unlawful use.

Following further discussions, AT&T informed ADT in a September 29, 2010 letter (Dkt. 8-1 at 20-22) that, unless ADT agreed to certain conditions set forth in the letter (including (i) the deposit into an escrow account of an amount representing the difference between the applicable residential resale rate and the applicable business resale rate for the telecommunications services purchased by ADT and ultimately provided to 951 LifeConnex customers for the months of July and August, 2010 and (ii) ADT's agreement to expedited resolution of the dispute in the FPSC based on a stipulated briefing schedule and without a hearing), AT&T would on the following day proceed as indicated in the Suspension and Disconnection Notice. On September 30, 2010, ADT filed its verified Complaint (Dkt. 1) and moved for a temporary restraining order in this Court.

ADT initially sought an order enjoining AT&T from (1) discontinuing the processing of new ADT orders for wholesale telephone service in Florida and (2) terminating the ICA "pending this

Court's resolution of ADT[']s claims." (Dkt. 8 at 14). However, ADT has since narrowed the relief sought.

The parties agree that the dispute resolution provision in the ICA as well as the TCA<sup>3</sup> and the doctrine of primary jurisdiction<sup>4</sup> generally require disputes regarding the interpretation and enforcement of the ICA to be presented in the first instance to the FPSC.<sup>5</sup> Moreover, at the November 3, 2010 hearing, counsel for ADT agreed that provisional injunctive relief as to Count Two of the Complaint would require a preliminary construction of the ICA that would unduly interfere with the primary jurisdiction of the FPSC to interpret the ICA. Accordingly, ADT seeks injunctive relief as to Count One only to preserve the status quo until the FPSC (rather than this Court) resolves the parties' dispute as to AT&T's alleged right to terminate the ICA (the "termination dispute").

For the reasons stated at the November 3, 2010 hearing, which are incorporated herein, ADT's motion is denied. Even as to Count One, preliminary injunctive relief would unduly interfere with the FPSC's primary jurisdiction over interpretation and enforcement of the ICA, since ADT

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<sup>3</sup> See *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) (en banc) (dicta) ("[T]he language of [47 U.S.C.] § 252 persuades us that in granting the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce *in the first instance* and to subject their determination to challenges in the federal courts") (emphasis added); *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 344 (3d Cir. 2007) (holding that "interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission.").

<sup>4</sup> See *Illinois Bell Telephone Co., Inc. v. Global NAPs Illinois, Inc.*, 551 F.3d 587, 593-96 (7th Cir. 2008).

<sup>5</sup> AT&T also contends that this Court lack subject matter jurisdiction to decide ADT's motion for preliminary injunction. This contention is rejected. 47 U.S.C. § 252(e)(6) does not divest federal district courts of subject matter jurisdiction conferred by the general jurisdictional provisions of Title 28. See *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 641-42 (2002); *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 84-85 (1st Cir. 2010); *Southern New England Telephone Co. v. Global NAPs Inc.*, --- F.3d ---, No. 08-4518-cv, 2010 WL 3325962, at \*6-9 (2d Cir. Aug. 25, 2010).

seeks to enforce a provision of the ICA, a matter which should be presented to the FPSC. *See BellSouth Telecomms*, 317 F.3d at 1278 n.9; *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 818-22 (1973). Moreover, ADT has not demonstrated a likelihood of irreparable harm stemming from the specific conduct complained of in Count One, AT&T's failure to seek resolution of the termination dispute before the FPSC. More specifically, ADT has not demonstrated how it will be irreparably harmed by AT&T's failure to take the dispute to the FPSC. Indeed, ADT had (and has) the right to present the dispute to the FPSC, thereby mitigating any claimed harm.

The parties acknowledge that an expedited dispute resolution procedure is available before the FPSC.<sup>6</sup> ADT has not demonstrated that such a procedure is unavailable or otherwise inadequate.<sup>7</sup> Finally, no estimate of the likelihood of irreparable harm from AT&T's wrongful termination of service to ADT is possible without a preliminary determination of the merits of the termination dispute. Such a determination would necessarily interfere with the FPSC's primary jurisdiction to interpret and enforce the ICA.

Accordingly, Plaintiff's construed motion for preliminary injunction (Dkt. 2) is **DENIED**. Since ADT's claims must be resolved by the FPSC in the first instance and dismissal of this action without prejudice will not disadvantage the parties,<sup>8</sup> this case is **DISMISSED** without prejudice.

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<sup>6</sup> Indeed, when AT&T notified ADT's affiliate, LifeConnex, that it intended to terminate service to LifeConnex under another ICA (which contained an identical dispute resolution provision, *see* Dkt. 10 at 9 n.9; Dkt. 10-5 at 2), LifeConnex sought emergency relief in the FPSC and apparently succeeded in obtaining an interim procedural ruling within fifteen days. *See* Dkt. Dkt 8-1 at 7-8; Dkt. 10-3.

<sup>7</sup> ADT's contention that the FPSC may lack the power to grant injunctive relief is unconvincing, absent persuasive evidence that an interim procedural order of the kind the FPSC entered in the LifeConnex matter, *see* Dkt. 10-3, could not provide effective relief.

<sup>8</sup> *See Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993) (noting that, under the primary jurisdiction doctrine, the Court has discretion either to stay the case and retain jurisdiction "or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice").

The Clerk is directed to close the file.

**DONE AND ORDERED** in chambers this 4<sup>th</sup> day of November, 2010.

  
**JAMES D. WHITTEMORE**  
United States District Judge

Copies to: Counsel of Record